92-1952

NO:_____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

THOMAS M. READ,
Petitioner

vs.

THE UNITED STATES OF AMERICA, ET AL,
Respondents

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

***

PETITION FOR WRIT OF CERTIORARI

***

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COPY

QUESTIONS PRESENTED FOR REVIEW

1. DOES EACH PRIVATE INDIVIDUAL, PROTECTED BY THE LAWS OF THE UNITED STATES, POSSESS AN ABSOLUTE AND INALIENABLE RIGHT TO REDRESS?

2. DOES EACH PRIVATE INDIVIDUAL, PROTECTED BY THE LAWS OF THE UNITED STATES, POSSESS AN ABSOLUTE AND INALIENABLE RIGHT TO DUE PROCESS OF LAW RELATING TO DISPUTES INVOLVING ITS LIFE, INVOLVING ITS LIBERTY, OR INVOLVING ITS PROPERTY, WITHIN ALL PROCEEDINGS BROUGHT UNDER THE LAWS OF THE UNITED STATES AND/OR THE LAWS OF THE SEVERAL INDIVIDUAL STATES?

3. DOES A FEDERAL ISSUE ARISE DIRECTLY UNDER THE FIRST, FIFTH, SEVENTH, AND TENTH, AMENDMENTS WHEN ONE OR MORE FEDERAL COURTS, SUA SPONTE, INTERVENE MISSTATE FACTS OTHERWISE DETERMINED BY A JURY AT A PROPER TRIAL, AND OBSTRUCT THE EXECUTION OF A JUDGMENT AGAINST A JUDGMENT DEBTOR LIABLE UNDER STATE AND COMMON LAW?

PARTIES AND RESPECTIVE CAPACITIES

1. THE UNITED STATES OF AMERICA IS PARTY TO THE SUIT BELOW, AS THE REAL PARTY IN INTEREST, JUDGMENT DEBTOR, PURSUANT TO THE TAKING CLAUSE OF THE FIFTH AMENDMENT; UNDER 28 U.S.C. §1346(a)(2); AND IN A LIMITED ALTERNATIVE UNDER 28 U.S.C. §1346(b), THE TORTS CLAIMS ACT.

2. THE HON. ALAN JAROSLOVSKY, A BANKRUPTCY JUDGE, IS NAMED IN HIS INDIVIDUAL AND/OR OFFICIAL CAPACITIES.

3 THE HON. JAMES MEYERS A BANKRUPTCY APPELLATE PANEL JUDGE, IS NAMED IN HIS INDIVIDUAL AND/OR OFFICIAL CAPACITIES.

4. THE HON. BARRY RUSSEL, A BANKRUPTCY APPELLATE PANEL JUDGE, IS NAMED IN HIS INDIVIDUAL AND/OR OFFICIAL CAPACITIES.

5. THE HON. ROBERT CLIVE JONES, A BANKRUPTCY APPELLATE PANEL JUDGE, IS NAMED IN HIS INDIVIDUAL AND/OR OFFICIAL CAPACITIES.

6. THE HON. ALAN NEVAS, A DISTRICT COURT JUDGE, IS NAMED IN HIS INDIVIDUAL AND/OR OFFICIAL CAPACITIES.

7. THE HON. JON O. NEWMAN, AN APPELLATE JUDGE FOR THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, IS NAMED IN HIS INDIVIDUAL AND/OR OFFICIAL CAPACITIES.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE CASE BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	6
REASON FOR GRANTING THIS WRIT	28
CONCLUSION	29
APPENDIX	APPENDIX. 1

TABLE OF AUTHORITIES

Page

Constitutional Provisions

U.S. Const. Art. III, sec. 2, cl. 1 ..... 2, 20
U.S. Const. Amend. 1, cl. 2 and 3 2
U.S. Const. Amend. 5, cl. 4 ..... 2, 19
U.S. Const. Amend. 5, cl. 5 3
U.S. Const. Amend. 7, cl. 1 ..... 3, 19
U.S. Const. Amend. 7, cl. 2 ..... 3, 19
U.S. Const. Amend. 10 ..... 3, 21

Federal Statutes

11 U.S.C. §523(a)(2), (a)(4), (a)(6) 11
11 U.S.C. §727 10
18 U.S.C. §1961 22
18 U.S.C. §1964 ..... 6, 22
18 U.S.C. §1965 7
28 U.S.C. §157(b)(2)(A) 15
28 U.S.C. §455 18
28 U.S.C. §1254(1) 2
28 U.S.C. §1331 ..... 3, 6, 29
28 U.S.C. §1332 ..... 3, 6
28 U.S.C. §1334 ..... 3, 6, 12. 13, 15
28 U.S.C. §1343 ..... 4, 6
28 U.S.C. §1346(a)(2) 4, 6
28 U.S.C. §1346(b) 5, 6
28 U.S.C. §1356 ..... 5, 6
28 U.S.C. §1391(d)(2) 7
28 U.S.C. §1402(b) 7
28 U.S.C. §1409(e) 7
42 U.S.C. §1983 5
42 U.S.C. §1985 5

State Statutes

Conn. G.S. §52-278e 8
Conn. G.S. §52-568(a)(2) 9
Conn. G.S. §52-570 10

Rules

Rule 38, F.R.Civ.P. 17
Rule 41(b), F.R.Civ.P.....19
Rule 60(b)(4), F.R.Civ.P.....18
B.R. 9003.....11
B.R. 9027(a)(3), (c), (d), (f).....11

Cases

Barton v. Barbour,
104 U.S. 126.....15
Blake v. Levy,
464 A.2d 52, 191 Conn. 257 (1983).....9
Bradley v. Fisher,
80 U.S. 335 (1871).....21, 22
Cochise College Park, v. Wallace Perry, Trustee
703 F.2d 1339 (9th Cir. 1983).....14
Connecticut v. Doehr,
111 S.Ct. 2105 (1991).....8
Duck v. Read,
CV 83-0283376S (CT., 1986).....7
Duck v. Read,
Bkrtcy No. 1-80-00167, A.P. 1-88-0097 (1988)..12
In re: Gorski,
766 F.2d 723 (2d Cir. 1985).....22
Hoppe v. Klapperich,
224 Minn. 224, 28 N.W. 2d 780,
173 A.L.R. 819 (1947).....21
In re: Jacksen,
1-80-00167.....15
In re: Jacksen, Read v. Duck,
105 B.R. 542 (9th Cir. BAP 1989).....15
In re: Johnson,
518 F.2d 246 14
Leonard v. Vrooman,
383 F.2d 556 (9th Cir. 1967).....14
Loan Assoc. v. Topeka,
20 Wall. 655 (1874).....26
Local Loan Co. v. Hunt,

292 U.S. 234.....25
Louisville Bank v. Radford,
295 U.S. 555 (1935).....25
Mitchell v. Clark,
110 U.S. 633.....25
Mosser v. Darrow,
341 U.S. 267 (1951).....10, 14, 22
McGlasker v. Calton,
397 F.Supp. 525 (M.D. Ala. 1975).....21
Ochoa v. Hernandez y Morales,
230 U.S. 139 (1912).....26
Read, et al v. Duck, et al
H-89-655 (D.C. Conn. 1990).....17
Read, et al, v. Duck, et al,
90-7107, ___U.S.___.....20
Scott v. Stansfield,
3 Law Reports, Exchequer, 220.....24
United States of America v. Charles Duck,
CR 89-0543 (D.C. N.D. Cal. 1990).....16
Zarcone v. Perry,
572 F.2d 52 (2d Cir. 1978).....21

Misc. and Publications
A History of English Law,
6 W.Holdworth, 236 (1924).....21
Personal Liability of Trustees and Receivers
In Bankruptcy
Tiller, 53 Am. Bankr. L.J. 75, 99-102 (1979).....10
United States Trustee Program, Hearing
Before House Subcommittee On Economic
and Commercial Law, 102d Congress
Serial No. 61, November 6, 1991.....App. 54, 8

IN THE
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A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

***

Petitioner, Thomas M. Read, a real person, prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Federal Circuit filed in the above entitled proceeding on March 8, 1993.

OPINIONS BELOW

The opinion and mandate of the United States Court of Appeals for the Federal Circuit, Docket No. 92-1550, is unreported and is reproduced herein (App. 1). A review of that opinion is sought pursuant to Supreme Court Rule 10.

The Ruling and Judgment of the U.S. District Court for the District of Connecticut, is unreported and is reproduced herein (App. 5).

JURISDICTION

The opinion of the U.S. Court of Appeals for the Federal Circuit, "per curiam", was filed and judgment was entered on March 8, 1993. A mandate issued from that same Court on March 28, 1993, even though a Notice and Objection To Decision had been received on March 19, 1993. By its instruction to the Court Clerk on May 10, 1993, the "Motions Panel" for the U.S. Court of Appeals for the Federal Circuit, ordered that the "filing" (the Notice and Objection) not be accepted, pursuant to its opinion declared directive entered March 8 1993.

This Petition for Writ of Certiorari has been filed within ninety days of that date. Upon that Order and Judgment entered on March 8, 1993, this Court's discretionary jurisdiction is invoked, pursuant to **28 U.S.C. §1254(1)**.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. III, sec. 2, cl. 1:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and ... -- to controversies to which the United States shall be a party; ...between citizens of different states..."

U.S. Const. Amend. I, cl. 2 and 3 (conjunctively):

"Congress shall make no law ... abridging the freedom of speech ... ; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

U.S. Const. Amend. 5, cl. 4:

"No person ... shall be ... deprived of ... liberty, or property, without due process of law;"

U.S. Const. Amend 5, cl 5:

"nor shall private property be taken for public use, without just compensation."

U.S. Const. Amend 7, cl 1:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,"

U.S. Const. Amend. 7, cl. 2:

"and no fact tried by a jury shall be otherwise reexamined by any court of the United States than according to the rules of the common law."

U.S. Const. Amend. 10:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

28 U.S.C. §1331:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. §1332:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --

(1) Citizens of different States; ..."

28 U.S.C. §1334:

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11, but not arising under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing *such proceeding* ... "

28 U.S.C. §1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights ..."

28 U.S.C. §1346:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any act of Congress, ... or for liquidated or unliquidated damages in cases not sounding in tort..."

(b) [T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing ... for injury or loss of property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. §1356:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction."

42 U.S.C. §1983, Sec. 1:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1985:

"(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or ... if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for

lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; ...(3) ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, in any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

On October 21, 1991, petitioner filed a Civil RICO/Civil Rights lawsuit in the U.S. District Court for the District of Connecticut. Within, were named the United States of America, four Article I bankruptcy judges, and two Article III judges, as co-conspirators to an ongoing racket that operates out of and under the protection of the U.S. Bankruptcy Court for the Northern District of California, at Santa Rosa, California. The relationship of the named federal officer defendants to the operatives who carried out their wishes, is that as federal judges, each knew that the acts committed against the petitioner was unlawful, each knew the truth of the allegations made in petitioner's complaint, and each attempted to conceal from the record of its respective court, by means of evidence tampering; intimidation of witness; and unauthorized orders and decrees; and overt fraud to the courts upon which society has entrusted them to preside; the nature of racketeering activity ongoing in the Northern California area bankruptcy system.

The U.S. District Court for the District of Connecticut acquired subject matter jurisdiction, pursuant to **28 U.S.C. §1331**, federal issue jurisdiction (generally); **28 U.S.C. §1332; 28 U.S.C. §1334; 18 U.S.C. §1964(c); 28 U.S.C. §1343; 28 U.S.C. §1346; and 28 U.S.C. §1356.**

The U.S. District Court for the District of Connecticut acquired personal jurisdiction (venue) over the parties named

therein, pursuant to **18 U.S.C. §1965; 28 U.S.C. §1391(d)(2) & (d)(3); 28 U.S.C. §1402(b); and 28 U.S.C. §1409(e).** Venue to the Connecticut district court is separately provided, pursuant to Rule 782 of Rules of Bankruptcy Procedure, in an order issued by the U.S. Bankruptcy Court for the Northern District of California, dated June 26, 1981, that originally transferred the issues underlying this action to Connecticut.

Petitioner Thomas M. Read ("Read"), having been determined by a jury at trial that his family was knowingly induced into a fraud by several private citizen California bankruptcy appointees acting under color of federal law, obtained a judgment after a six day jury trial in the State of Connecticut, at Danbury, Connecticut, against a California bankruptcy trustee, Charles Duck ("Duck").

That judgment was unappealed and became final.[1]

The period of time elapsed between the inducement to fraud and the entry of final judgment against Mr. Duck, and in favor of Mr. and Mrs. Read, was in excess of six years (May 1, 1980 through October 21, 1986).

During that period, Read and his wife Sandra ("the Reads") were subjected as defendants to four separate waves of fraudulent lawsuits upon false claims relating to a relatively trivial little scam that was based upon the same nucleus of fact in each wave of action. The pecuniary loss to the Read family imposed by those six and one half years of meritless litigation was approximately $346,000.

The first, second, and fourth waves of unlawful action were by persons acting under color of federal law, as court appointed fiduciaries for a bankruptcy estate. The third wave of litigation was initiated by the debtors in their post-petition individual capacity, and commenced the action in state court. The last action, the only action gone to trial upon the merits

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[1] **Duck v. Read, et al, Case No. CV 83-0283376S**, The Connecticut Superior Court for the Judicial District of Danbury, at Danbury, Connecticut, entered on October 21, 1986, unappealed. See: App. pp. 15-16.

(also, the only trial ever conducted), was spearheaded by Charles Duck.[2]

The original plaintiff in the state court action was Niels and Susan Jacksen ("Jacksens"), a married couple residing in California, and who were debtors in a case proceeding under title 11. Their third effort at suit against Read was filed in September of 1983, and it included an Ex Parte PJR attachment upon the Reads' home.[3] Approximately fifteen months after the state court action was commenced by Jacksens, Duck, as bankruptcy trustee, intervened as the "real party in interest" (January, 1985).

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2 For an official description of Mr. Duck and his special relationship with the Northern California bankruptcy system, please refer to **UNITED STATES TRUSTEE PROGRAM IN BANKRUPTCY, Hearing before the House Subcommittee On Economic and Commercial Law, One Hundred Second Congress, First Session, November 6, 1991, Serial No. 61**, statement of Anthony G. Sousa, U.S. Trustee for Region 17, pages 32-33. An excerpt from that report relates:

> *"I recall one instance in which our office joined a creditors committee in objecting to an action which Duck had proposed. The judge, apparently aware of the problems we were having with Duck, railed against our program for what he considered to be an attack on Duck. In a meeting requested by the judge, he told me that Charles Duck was not only the best trustee in all of northern California, he was possibly the best trustee in the entire country."* Id. at 32 (emphasis added) See: App. pp. 62
>
> *"... On May 17, 1989, he resigned from all of his cases. On September 25, 1989, a two count criminal information was filed in the U.S. district court in San Francisco, charging Duck with embezzling almost $1.9 million in bankruptcy estate funds. He pleaded guilty to both counts and was sentenced on January 19, 1990, to 27 months in Federal prison, fined $5,000 and ordered to pay restitution of $1.9 million."* See: App. pp. 63

3 This Court declared **Conn. G.S. §52-278e**, the authority for the attachment upon the Reads' home, unconstitutional in 1991. See: **Connecticut v. Doehr, ____U.S.____, 115 L.Ed. 2d 1, 111 S.Ct 2105**, and this Court's summary in Part III. relating to the inherent due process violations observed by this Court.

When Duck intervened, he knew that Read had filed counterclaims, and that Read sought to apply those counterclaims against any party maintaining the alleged fraudulent suit against the Read family. Upon order from the state court, Duck agreed to appear "for purposes of counterclaims".

The period of time covered by the suit claims against Read was from May 1, 1980 through August 6, 1982 (28 months). The period of time covered by the allowable counterclaims against Jacksen (et al), was from May 1, 1980 (the genesis of the Reads' entrapment in the scam) through November 6, 1980 (the time when the fraud became revealed to Read and others in Connecticut).

The Jacksens had petitioned for relief under Chapter 11 of title 11, in the U.S. Bankruptcy Court for the Northern District of California, at Eureka, California, on March 4, 1980, two months prior to the involvement of the Reads with any entity in California. As such, it is a material fact of this case that the Reads did not deal with the Jacksens, as private individuals. Their only dealings with them was in the Jacksens' capacity as federal bankruptcy court appointed "debtor in possession", as trustee.

Other issues involving issues of extortion, larceny, and vexatious litigation under relevant provisions of Connecticut law, were premature under the common law of the State of Connecticut, to bring forward until after the judgment upon Duck's suit against the Reads had been decided in Reads' favor, and had become final.[4]

The jury indeed found there was no merit to the claims against the Read family for reason that the "debtor in possession" had breached its agreement with the Reads.

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[4] Connecticut case law under **Conn. G.S. §52-568(a)(2)** requires that in suits for vexatious litigation, it is sound policy to require plaintiff to allege that prior litigation terminated in his favor. This requirement serves to discourage unfounded litigation without impairing the presentation of honest but uncertain causes of action to the courts, and serves the interest of finality of judicial decisions. **Blake v. Levy , 464 A.2d 52, 191 Conn. 257 (1983)**

Separately, the jury determined that a fraud was created and perpetrated by the California bankruptcy court appointees. It further found that the Reads had been knowingly induced by the California bankruptcy court appointees into that fraud (a non-contract tort offense under the common law of the State of Connecticut). The jury further found that the Reads had been damaged in the amount of $10,000 for the limited nature of pecuniary loss that, as defendants, the Reads could claim in the action brought against them by the Jacksens and then Duck.

In December of 1986, Read sought to commence repair to his family, and filed a Proof of Claim in the California bankruptcy court[5], but it was "denied" at a hearing in January 1987 (without prejudice), because the estate was (and had always been) without any assets.[6]

In December of 1987, Read then sought, under applicable state law, to execute the judgment against Duck, personally, in California state court.[7]

Duck, through his counsel, intimidated the state court judge, claiming that federal bankruptcy law protected the trustee, pursuant to **11 U.S.C. §727** (the debtor's discharge stay to further collection of pre-petition contract obligations), and Read argued that a judgment upon a jury determination of

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[5] Under Connecticut law, a judgment against a fiduciary should be first claimed against the estate, then, if insufficient funds are available, as against the fiduciary, personally. See: Conn. **G.S. §52-570a(a) & (b). Action against a fiduciary.**

[6] Although Read maintains possession of a transcript of this hearing, no order reflecting the transcribed order from that court was then, or has ever since,been issued.

[7] **Conn. G.S. §52-570a(c)**, allows a judgment creditor to hold a fiduciary personally liable if his adjudicated conduct violates the standard applicable to an ordinary man in prudent management of his own affairs. This court has held that "*The most effective sanction for good administration is personal liability for the consequences of forbidden acts...*". **Mosser v. Darrow, 341 U.S. 267 (1951)**, at 273-74. For an excellent discussion upon the diverse complexity of the subject please see: **Tiller, Personal Liability of Trustees and Receivers in Bankruptcy, 53 Am. Bankr. L.J. 75**, 99-102 (Winter 1979)

willful fraud was not forgiven under any provision of title 11, as to the debtor or any other entity by derivation.[8]

Meanwhile, Duck, ex parte[9], approached the bankruptcy court and reopened the Jacksen case (closed over a year earlier), and, after reopening the case, he proceeded to file an ex parte application for removal of the execution action pending in California state court. He never served a copy of the application upon the Reads in Connecticut, the clerk for the California state court where the action was pending, or the clerk Connecticut Superior Court for the State of Connecticut which maintained jurisdiction over the parties until execution of judgment.

Records from the Northern California bankruptcy court reveal that over two months after Duck approached the bankruptcy court to reopen the Jacksen case, Read was sent a "Law and Motion" hearing notice to "Determine Jurisdiction and Status Conference". Read traveled from Connecticut to California to attend the hearing, and to express his concerns that none of the provisions of **Bankruptcy Rule 9027** had been met.[10]

On July 15, 1988, the presiding judge, a defendant upon petitioner's case below, dismissed Duck's rationale for protection, but declared "regardless of how this case came

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8 See: **11 U.S.C. §523(a)(2), (a)(4), and (a)(6)**: acts of wilful and malicious fraud excepted from the protections of title 11.

9 **B.R. 9003** states: *"Except as otherwis permitted by applicable law, any party in interest and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding."* Amended Mar. 30, 1987, eff. Aug 1 1987. (emphasis added)

10 **B.R. 9027** requires that a case removed from state court to bankruptcy court must meet certain time limits that had expired several years prior to the application filed by Duck, and also that the state court and the opposing party be provided a copy of the application. (ref: **B.R. 9027(a)(3), (c), and (d)**. Also required is an active rem, but the case tried in Connecticut was closed after the appeal and time for reopening under relevant Connecticut statutes had lapsed without a murmur from Duck. See App. 17-18.

here", that he (the bankruptcy judge) intended to determine the enforceability of the judgment.

On July 18, 1988, the California bankruptcy judge entered an opinion claiming his court maintained jurisdiction, pursuant to **28 U.S.C. §1334**, and issued a permanent injunction against the Reads, barring them from ever enforcing their judgment against the trustee personally, and further enjoining them from taking any further action upon their judgment from the Connecticut state court "without leave" of the California bankruptcy court.[11]

The California bankruptcy court made no reference to the fact that the proceeding before it was a "Law and Motion" proceeding, and expressly not a "trial" proceeding.[12]

The California bankruptcy court made no reference to the fact that the exclusive reason that its involvement at the time was resulted from an Ex Parte motion filed by trustee, Duck, which at the "Hearing" it labeled a "red herring", and within its "Memorandum of Decision" it declared "The discharge protects the debtor, not the trustee or the estate."[13]

The California bankruptcy court did not reconcile its declaration of subject matter or personal jurisdiction under **28 U.S.C. §1334**, enacted in 1984, over issues resolved in a state court proceeding initiated in 1983.[14]

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11 **In re: Niels F. and Susan Jacksen, Charles Duck v. Thomas M. and Sandra A. Read, Bkrtcy No. 1-80-00167, Adversary No: 1-88-0097 (U.S. Bkrtcy Ct, N.D. Cal. 1988)** See: App. pp. 19-23.

12 The court file copy of the notice sent to Read is specifically stamped "law and motion", and "trial" is scratched out by the clerk. Until just minutes prior to the "Hearing", Read had no idea what Duck had filed in the California bankruptcy court, since Read had not been served with a copy of Duck's "Application for Removal". Furthermore, the action pending in the California state court was still pending, and continued to remain pending for three months beyond the July 15, 1988 "Hearing".

13 See App. pp.20.

14 The circumstance that the filing date of the Connecticut lawsuit against the Reads predated passage of the jurisdictional authority invoked by the California bankruptcy court by a year, raises the dual federal question whether the bankruptcy court asserted jurisdiction was

The California bankruptcy court did not reconcile its declaration that "... the only permissible source of recovery is the bankruptcy estate, over which this Court exercises exclusive jurisdiction pursuant to **28 U.S.C. section 1334(a).**", when in order to make a *judicial* determination that would *invoke* its exclusive jurisdiction, it therefore must have earlier made a *non-judicial* decision that "... the only permissible source of recovery is the bankruptcy estate ...".[15]

Reads timely filed an appeal to the Bankruptcy Appellate Panel for the U.S. Court of Appeals for the Ninth Circuit.

In their briefs Reads argued that the California bankruptcy court lacked any jurisdiction over the persons of the Reads that would enable it to limit their private actions under non-bankruptcy law because it also lacked any jurisdiction over the private person of Duck or his private property, and also lacked any jurisdiction over subject matter of the res that was adjudicated in the suit that Duck maintained in Connecticut; and upon which a jury trial had been already conducted; and upon which a judgment had been entered; and which judgment had become final; and not subject to a re-opening under applicable state law.

The Reads pointed out that Duck had never asserted any manner of defense to his liability under Connecticut law, or the common law relating to fiduciary liability. The Reads argued that the Ninth circuit had expressly held that a

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unlawful, and therefore void the order of injunction, or whether Congress had passed an ex post facto law, in violation of Art. I, Sect. 9, cl. 3, of the U.S. Constitution, and therefore unconstitutional (under which latter circumstance the asserted jurisdiction would likewise be invalid and the injunction order void)?

[15] Notwithstanding the California bankruptcy court's lengthy argument and interpretation of the *law* of fiduciary liability, the fact remains that the issue of "exclusive" liability of the estate was not litigated in the Connecticut trial proceeding, and under the *law* (as determined by this Court) is not absolute. The McNulta defense pertains only to good faith immunity issues, never to a fiduciary whose own acts comprise tort offenses under the laws of the state in which he acts.

bankruptcy trustee was personally liable for damages to the property of others resulting from its wrongful appropriation of same[16], and that the doctrines of res judicata and collateral estoppel prevented Duck from raising the defenses in a California federal court, two years after the trial he sought went against him in the Connecticut state court.

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[16]See: **Leonard v. Vrooman, 383 F.2d 556 (9th Cir. 1967)**, stating that when a U.S. bankruptcy court appointed trustee

> "*never at any relevant time had any right, title, claim, or interest in the property ...*" Id. at 561. "*... and is sued in state court for such acts, he will not be protected by the injunctive power of the Bankruptcy Court ...*" Id. at 560, and "*[u]nder the law as heretofore set forth, the trustee may be sued without leave of Court. Therefore, the injunction was improvidently granted ...*". Id. at 561. (emphasis added)

See also: **Cochise College Park, et al, v. Wallace Perry, Bankruptcy Trustee, 703 F.2d 1339 (9th Cir. 1983)**, that at 1374-75, where the Ninth Circuit with the issue of trustee misconduct and the personal liability of bankruptcy trustees under certain circumstances effected in his position of control. One of the specific circumstances that was on point with the post judgment issue created in the California bankruptcy court by its judge (the singular object of the appeal to the BAP), was the liability of a trustee involving a trustee breach of an executory contract. (Compare to an opposite interpretation by the BAP, see: App. pp. 27) The Connecticut judgment against Duck had resolved the issue of there being a breach of an executory contract, and Reads had pointedly referenced the passage in **Cochise** where the U.S. Court of Appeals for the Ninth Circuit had resolved any question of personal liability by the trustee in such matters. It said:

> *"A bankruptcy or reorganization trustee is a fiduciary of each creditor of the estate, including anyone who is a party to an executory contract with the bankrupt. (citations deleted)... As such, he has a duty to treat all creditors fairly and to exercise that measure of care and diligence that an ordinarily prudent person under similar circumstances would exercise. (citations deleted) ... [H]e is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law,* see **Mosser, 341 U.S. at 272, 274; Johnson, 518 F.2d 246, 251**; cf. **Leonard v. Vrooman, 383 F.2d 556, 561 (9th Cir. 1967)** (trustee is personally liable for acts which either are not taken in good faith or are unreasonable). n26

A year and a half later (September 27, 1989), the Bankruptcy Appellate Panel for the U.S. Court of Appeals for the Ninth Circuit, entered its decision.[17] It determined that the bankruptcy court obtained "core" jurisdiction over the civil case by means of **28 U.S.C. §157(b)(2)(A)**, and **28 U.S.C. §1334**, "matters concerning the administration of the estate". The BAP did not explain exactly how it was reasoned that "matters" that did not involve property of the "estate" or the "debtor", tried to completion by a jury in state court 2800 miles away, 1-1/2 years after a final judgment, unappealed, were in any way a live issue concerning the administration of a bankruptcy case that had been closed afterward because the jury determination extinguished the only asserted "asset" belonging to the estate for its last two years of existence.[18]

To imagine that fraudulent acts of federal bankruptcy court appointees, determined by a jury to be in nature of a non-contract tort, then after judgment against them that they were somehow able to breath new life into a well rotted, and long buried, corpse of a bankruptcy case[19] for purposes of federal bankruptcy "core" jurisdiction over the execution of that state court judgment against the named judgment debtor, is surely grounds for questioning the jurisdictional authority and/or constitutional basis upon which the BAP relied.

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17 **In re Niels & Susan Jacksen, Debtors, Thomas & Sandra Read, applts, v. Charles Duck, BAP No. NC-88-1680-MeRJ., Bkrptcy No. 1-80-00167, Adv. No. 1-88-0097, 105 B.R. 542 (9th Cir BAP. 1989).** See App. pp. 24-29.

18 The bankruptcy case, **In re Jacksen, No. 1-80-00167**, was finally closed on February 7, 1987, after the administrative claim of Read against the estate, filed in December of 1986, was denied "without prejudice", on January 16, 1987, by the Santa Rosa, California bankruptcy court.

19 See: **Barton v. Barbour, 104 U.S. 126, at 137**:
"When it [the bankruptcy power] is applied with dispatch, and the effects of the insolvent corporation are faithfully used to meet its liabilities and its dead body is buried out of sight as soon as possible, no objection can be made to the procedure..."

Otherwise, one must accept the practical reality that there exist such federal 'zombies', that may come back to life at any time to plague an innocent and unsuspecting society.

The BAP affirmed the bankruptcy judge's order, upon grounds that bankruptcy trustees, like federal judges, enjoy "derived judicial immunity"[20], because they are an "arm" of the "court appointing" them, and that they must be protected from the "rigors of suit". The BAP made many other declarations, as well (including the assertion that the issues tried by the Connecticut jury were "pre-petition" issues, a statement that is both false, and disproved by the record of the Connecticut case). These, and other declarations, were absolutely known to each of the three judges therein to be false. The falsity of these material declarations is substance of the action below, review of which is sought for purposes of remand for trial.

Meanwhile (throughout the Spring, Summer and Fall of 1989), Duck's past several years of escapades had been unraveled to the general public by the diligent efforts of a newly appointed U.S. Trustee, Anthony Sousa, and many other victims of his up-to-then federally protected ways. On September 25, 1989, Duck signed a Plea Bargain with the U.S. Attorney's Office, admitting to embezzlement and theft of $1.9 million (a figure that climbed to $2.6 million shortly thereafter).[21]

On October 10, 1989, through a local attorney from Bristol, CT, Read filed his first action after the jury trial as a

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20 In addition to an overwhelming amount of superior and controlling authority to the contrary of the BAP holding of "immunity" availed to a bankruptcy trustee (chapter 7, chapter 11, or otherwise), it is worthy to note the dialogue between Mr. Logan, Director, Executive Office For United States Trustees, and Rep. James, Panel Member, SubCommittee for Economic and Commercial Law, relating to trustee personal accountability, the stated purpose of the trustee's bond, malpractice insurance, etc., See: App. pp. 64-66. Note also, there was conspicuously absent any discussion of "derived judicial immunity".

21 **United States of America v. Charles Duck, No. CR 89-0543. U.S.D.C., Northern District of California. (1990)**

Plaintiff.[22]. The case was a Civil Rights/Civil RICO case in the U.S. District Court, at Hartford, CT. Working closely with his attorney, Read had gone back to California during the Summer of 1989, met with several other victims of Duck, and returned to Connecticut with overwhelming documentary evidence that a major racket had been flourishing in the Northern California bankruptcy system for many years. Many of these documents were woven into the structure of the case filed in the district court.

Read was finally able to claim the substantial damages his family had suffered years before, and believed that his ordeal would soon end. In that case a jury trial was demanded, pursuant to the Reads' Seventh Amendment protected right, and **Rule 38, F.R.Civ.P.**

Named within as defendants, were Duck's two appointing bankruptcy judges, Duck's and Jacksens' court appointed attorneys in California, Duck, and a law clerk to one of the named judges, who it was found upon documentary evidence obtained in California, when compared to documents filed in Connecticut, had likely falsified an official oath upon seal of the bankruptcy court to the Connecticut state court, in order to improperly aid Duck in his fraudulent suit in Connecticut.

Instead of addressing the issues presented in the Reads' complaint, the Connecticut district court in a dismissal hearing conducted June 27, 1990, invited sanctions against Read and his attorney for filing the case; ignored all the documentary evidence presented (statements made by the presiding judge affirmatively indicate he had not read one word of the complaint); sua sponte declared as "facts" matters that were utterly frivolous and clearly contradicted by the well documented procedural history that had gone to judgment after a proper trial; and ultimately proclaimed all the defendants "immune" from civil prosecution.

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22 **Thomas and Sandra Read v. Charles Duck, et al, H-89-655 (AHN).** U.S. District Court for the District of Connecticut, at Hartford. See App. pp. 30-45.

The Reads filed a motion to the district court requesting the judge to recuse himself, asserting that, mindful of the declared facts and presented documentation inopposite to his statements at the dismissal hearing, his impartiality could be reasonably questioned, pursuant to **28 U.S.C. §455(a)**. The Reads had earlier filed a motion, pursuant to **Rule 60(b)(4), F.R.Civ.P**, to have the California bankruptcy court injunction order declared void for lack of jurisdiction over their persons or the subject matter of enforcement of their Connecticut judgment against Duck by that California court.[23] The Reads' two Motions were denied in early July, 1990. The Article III district court judge presiding over that case filed in October of 1989, is a defendant in the Civil RICO/Civil Rights complaint that is subject of this petition.

The Reads timely filed a Notice of Appeal (an interlocutory appeal) against the two denials. One of the three judges upon the appeals panel is presently a defendant in this case.

On September 13, 1990, in a 19 page "Ruling" the district court dismissed each one of the defendants upon vehemently disputed "facts" never presented to the demanded jury, and then dismissed the case, without a trial and without an opportunity for the Reads to meaningfully disprove the assertions of that court, which in actual fact are themselves the opposing parties arguments, disputed by Read, and never presented to the demanded jury. The judge in that proceeding knowingly and fraudulently falsified the record of that case, and affixed his signature to the "Ruling" that he created.

A substantial issue brought forward in Read's Amended Complaint in the action below (never addressed), is that all the dicta in the "Ruling" written by the Connecticut district court in the 1989 Civil Rights/Civil RICO case, must be disregarded, for the reason that its mere presence violates the Seventh Amendment of the U.S. Constitution, by

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23 See App. pp. 46 and 47.

depriving the demanded jury of their untainted evidence[24]. It again violated the Seventh Amendment by stating as fact material matters that were utterly false, and known to the district court to be false, and which had already been presented to a jury in the only legitimate "trial" ever conducted[25], the trial in Connecticut Superior Court, conducted almost four years prior to the district court's "Ruling". A real 'due process' issue arises, since the authorities asserted by the district court were those falling under the exceptions provision against ruling upon the merits of a case, pursuant to **Rule 41(b), F.R.Civ.P.**[26] This circumstance has created then, a separate issue under the 'due process' clause of the Fifth Amendment to the U.S. Constitution.[27]

On September 30, 1990, The Second Circuit Court of Appeals also ignoring the procedural history presented in Reads' 1989 complaint, "affirmed" the district court's denial of the Read's two motions without reference to the clearly stated grounds, labeled the case below (not then brought to the jurisdiction of the Second Circuit) "frivolous", and then warned the Reads not to file further papers in the Second Circuit, lest they be subjected to court discipline.[28]

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24 **U.S. Const. Amend 7, cl. 1:** "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...".

25 **U.S. Const. Amend 7, cl. 2:** "[N]o fact tried by a jury shall be otherwise reexamined by any court of the United States than according to the rules of the common law."

26 **Rule 41(b):**

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other then a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." (emphasis added)

27 **U.S. Const. Amend. 5, cl. 4:** "No person ... shall be ... deprived of ... liberty, or property, without due process of law.

28 See: App. pp. 48-50.

The Reads timely filed a Notice of Appeal against the dismissal of their case by the district court. The admonitions of the Second Circuit were not ignored, they are however believed to be subordinate and liable to the constitutional issues discussed in petitioner's Amended Complaint relating to right to appeal.

On February 6, 1991, the U.S. Court of Appeals for the Second Circuit sanctioned Read $1,000 for docketing his timely filed and lawful appeal, and dismissed the appeal before the due date for the appellants' brief came to be.[29] Meanwhile, Read had asked this Court[30] to hear the matter prior to judgment by the Second Circuit, pursuant to this Court's Rule 11, expressing their concern therein of reprisal from the Second Circuit. This Court denied Read's petition.

Read's Amended Complaint, subject of this petition, alleges claims relating to the six federal judge defendants that their unstated objectives have, since January of 1987, constituted a consistent pattern of usurpation of constitutional federal authority for the singular purpose of depriving the Read family of their right to redress for common law grievances relating to damages unavoidably sustained by them, through no fault or negligence on the part of the Reads, that were actually caused by federal court appointees acting at the pleasure of certain federal bankruptcy judges (and others), in Northern California.

If this is proved to the demanded jury to be true, the circumstance is an issue arising under the First Amendment 'right to redress' clause[31], and draws a real question upon this point alone: whether each named judicial officer "necessarily knew" that he had acted in "clear absence" of the limited statutory grant of jurisdiction to his court? If so, then not

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29 See: App. pp. 51-52.

30 **THOMAS AND SANDRA READ v. CHARLES DUCK, ET AL, No. 90-7107**, Cert. denied. See: App. pp.53.

31 **U.S. Const. Amend. 1, sec. 2, cl. 1**: "Congress shall make no law ... abridging the freedom of speech ...: or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

only would their judicial immunity be possibly stripped from them[32], but an additional issue of violation of our nation's concept of federalism, and the constitutionality of such actions under the Tenth Amendment, becomes a legitimate issue, as stated in Read's Amended Complaint.[33]

After these bizarre episodes that included a declaration by the Second Circuit court of "frivolity" upon that which was absolute truth, and in concert in law with the Second Circuit's own holdings upon the issues of fiduciary and judicial liability

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32 See **Bradley v. Fisher, 80 U.S. 335 (1871)**, at 351, as follows:
"... that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction ..."
"A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."
Id. at 351-52

See also: **Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978)** judicial officer acting against an innocent citizen over which its court held no jurisdiction is subject to punitive as well as compensatory damages; **McGlasker v. Calton, 397 F.Supp. 525 (M.D. Ala. 1975)**, affirmed **524 F.2d 1230 (5th Cir. 1975)**; **Hoppe v. Klapperich, 224 Minn. 224, 28 N.W. 2d 780, 173 A.L.R. 819 (1947)**; and in treatise: **6 W.Holdsworth, A History of English Law 236 (1924)**.

The question to be resolved upon the consideration of liability of the two named Article III judges, is under the instant mutual circumstance that involve an alleged ploy to utilize the dismissal of defendants in order to dismiss the case for lack of jurisdiction, whether their respective self-knowledge of their own asserted lack of jurisdiction is a sufficient 'foreknowledge' to meet a "clear absense" test, strip their judicial immunity as Article III judges, and invoke personal liability for any subsequent damages resulting from the prejudice they may be proved to a jury to have intended to taint upon the plaintiff's case?

33 **U.S. Const. Amend. 10:** "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people" (emphasis added)

inopposite to the Article I judges of the Ninth Circuit BAP[34], constructively depriving Read of his day in court, Read sat down and put together the case forming the basis of this petition..

This case is a Civil RICO/Civil Rights case directed against each of the six principal federal judges involved in the federal scam that they are alleged to have created and perpetrated after a Connecticut jury trial upon fraudulent issues that they condoned. They are further alleged to have encouraged the California bankruptcy court appointees to engage in conduct that Congress has determined is "racketeering activity", pursuant to **18 U.S.C. §1961(A) and (D)**, and jurisdiction over which is granted to the "district court" by **18 U.S.C. §1964**. The facts alleged in this case are each documented. The controlling law governing the circumstances created by the facts is clear, as to its purpose, and as to its application as Read has asserted in his complaint.

The liability of the four Article I federal judges is alleged to be strictly unprotected by the doctrine of judicial immunity, upon grounds that there was no live "federal issue" to litigate in the California bankruptcy court, and further grounds that the only "issue" that ever had existed was the fraud knowingly perpetrated against the Reads by the California bankruptcy court appointees.

Under such circumstances as these, there would necessarily be "no excuse permissible" for the usurpation of federal powers alleged against the four Article I federal judges, since each had been presented a copy of the

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34 See: **In re Gorski, 766 F.2d 723 (2d Cir. 1985)**, at 244, where the lower court had found that the trustee's failure to carry out his obligations constituted "*a material breach and default of his fiduciary duties, and ... a negligent disregard of the rights and best interest of creditors.*" Id. at 725 (emphasis added) Compare to App. pp. 51-52.

Moreover, the Second Circuit court said: "*There is no question that a trustee in bankruptcy may be held personally liable for breach of his fiduciary duties.* **Mosser v. Darrow, 341 U.S. 267 (1951)**. *Such liability may attach as the result of negligent, as well as knowing or intentional, breaches.*" Id. at 727 (emphasis added)

exemplified judgment file from the Connecticut Superior Court conducting the trial, and which exemplification was in excess of a year old at the time of presentment.[35]

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[35] If each of the Article I bankruptcy judges knew that there had been a jury trial in state court in Connecticut;

If each of the Article I bankruptcy judges knew that their appointee, Charles Duck had fraudulently maintained the Connecticut action against the Read family. If each knew that under Connecticut law, the Superior Court for the State of Connecticut maintained jurisdiction over the res existing from September 1983 through October 21, 1986, and further maintained jurisdiction over the parties until execution of the judgment determined by that 1986 Connecticut jury;

If each of the Article I bankruptcy judges knew that the power of Congress under Article I of the U.S. Constitution, does not extend to the realm of substantive law invoked after an adjudication of a non-contract tort offense;

If each of the Article I defendants named upon this Civil RICO complaint necessarily knew that the judicial authority of its respective courts only extended to unlitigated claims relating to property in possession of an entity (such as a debtor, a trustee, or an estate) within its jurisdictional domain, and never to private property or persons not parties to a case proceeding under title 11;

If each Article I defendants knew that upon the expiration of the lawful appeal period of the Connecticut judgment, that there was severed for all time any argument of a nexus between the private rights of Read and any public rights (including federal protections) relating to any and all individuals involved in the Jacksen bankruptcy.

Then:

> Each of the four Article I defendants in this case necessarily knew that its respective and collective acts to thwart the private right of execution of the Connecticut judgment against the private property of Charles Duck, the judgment debtor, by the Read family, the judgment creditors, was a sequence of acts "... *[w]here there is clearly no jurisdiction over the subject matter* ...", and that "... *any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.*" Each Article I defendant in this case likewise knew that "... *jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the*

The Connecticut district court judge sitting on that 1989 case, and one of the five Circuit court judges, are also named for knowingly acting in violation of clear constitutional mandate as declared in Read's Complaint.

As individuals and as federal officials, the two Article III judges named are alleged to be inarguably subject to injunctive restraints, and possibly declaratory relief for their individual acts of alleged tampering with the evidence of a case before their respective courts; use of threats to intimidate a suppression of evidence in a case before their respective courts; acts to instill fear in the minds of the Reads and their attorney in order to deter the Reads' from lawful exercise of a constitutionally protected right to redress; obstruction of justice; slander of judgment; and fraud to their respective courts. All of which are overt acts that deprived the Reads of due process in their case before the district court, and, subsequently, the Reads' appeal of the 1990 dismissal by the Connecticut district court, docketed before the U.S. Court of Appeals for the Second Circuit.

In this case, the issue of "judicial immunity" is not relevant to the question of whether the underlying issues should be allowed to go to trial. This case lawfully seeks injunctive relief against the six individual judges, and it presents the heretofore undiscovered, but simple issue that, whenever society must shield its judicial officers in order to maintain their judicial independence and secure to society's benefit the objective of an independent judiciary,[36] then

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usurped authority." **Bradley v. Fisher, 80 U.S. 335 (1871)**, at 349-50

[36] See: **Bradley v. Fisher, 80 U.S. 335 (1871)**, at 350, in footnote referring to the common law genesis of the doctrine of judicial immunity, **Scott v. Stansfield, (3 Law Reports, Exchequer, 220)**, as follows

> *"This provision of the law* [judicial immunity] *is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with*

society (the beneficiary) must through taxation pay for its exclusive benefit received -- by assumption of protected offender's liability through payment of just compensation to the victim of any offenses adjudicated, pursuant to U.S. Const. Fifth Amend. cl. 5, the 'taking clause'[37]

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independence, and without fear of consequences." (emphasis added)

[37] The Supreme Court observed and declared in 1935 when it decided the case **Louisville Bank v. Radford**, ("**Radford**")**295 U.S. 555 (1935)**, as follows:

"The provisions of the [bankruptcy] acts, so far as concerned the debtor, were aimed to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes,' and to give him ' a new opportunity in life and a clear field for future effort, unhampered by the pressure of discouragement and preexisting debt,' **Local Loan Co. v. Hunt, 292 U.S. 234**, 244. *No bankruptcy act had undertaken to supply him capital with which to engage in business in the future."* Id. at 582 (emphasis added)

"The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because unlike the States, it is not prohibited from impairing the obligation of contracts. Compare **Mitchell v. Clark, 110 U.S. 633**. *But the effect of the [Bankruptcy] Act here complained of is not the discharge of [the debtor's] personal obligation. It is the taking of substantive rights in specific property acquired by the [secured creditor] prior to the [portion of the bankruptcy] Act."* Id. at 589-590. (emphasis added)

The **Radford** court continued, stating:

"The province of the Court is limited to deciding whether [a law] as applied has taken [a substantive right] from [a secured creditor] without compensation, and given to [the debtor], rights in specific property which are of substantial value." Id. at 601

Of such use of federal power, the **Radford** Court states:

"[T]he Fifth Amendment commands that however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation."

> *"If the public interest requires, and permits, the taking of property of individual[s] ... in order to relieve the necessities of individual [debtors], resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."* Id. at 601-602. (emphasis added)

Read's Complaint and Appeal below, assert the principle that the government's failure to hold the conduct of its federal officials and their appointees subordinate to the First, Fifth, Seventh and Tenth Amendments of the U.S. Constitution, was proper subject matter for the trial court to resolve as federal issues arising first on July 18, 1988.

Read's Complaint and Appeal were further concerned that the government has attempted to repudiate the clear statement of the Supreme Court that all three branches of government are subordinate to the provisions of the Fifth Amendment. See **Ochoa v. Hernandez y Morales, 230 U.S. 139 (1912)**, which states:

> *"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before [the] **Magna Charta**, was embodied in that charter (**Coke, 2 Inst. 45, 50**), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."* (emphasis added)

It is just such a 'taking' that Read had brought forth to the trial court for redress. About such manner of conduct if alleged, is discussed by the Supreme Court in its declaration in **Loan Association v. Topeka ("Loan Assoc."), 20 Wall. 655 (1874)**, at 662-664, as follows:

> *"... [W]here the purpose for which the [official power] was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right."* Id. at 662 (emphasis added)

Read's Complaint alleges that the official power of the federal bench in the California and Connecticut federal courts has not been used for its intended public purpose, but instead "purely in aid of private or personal objects", and that such use of federal judicial power was a clearly an "... unauthorized invasion of private right."

An underlying point in all the post 1986 trial proceedings is that the Read family had incurred substantial discernible, but unlitigated damages resulting from the six and one half years of fraudulent litigation wrought by the California bankruptcy system appointees. This central point is fundamental to the questions presented in this Petition. A plaintiff who may prove damages due to a certain type of congressionally defined unlawful conduct, which conduct is also made actionable by Congress, either is entitled to bring his case to court, or is not protected by the Constitution and the laws derived therefrom.[38]

Read's Complaint alleges that there was absolutely no justicable issue before any California federal courts (including the bankruptcy court in Santa Rosa, California) at any time after the month of June, 1981, the month in which venue over a post-petition dispute was moved to the Connecticut bankruptcy court. App. pp.8 and 9. (change of venue).

Read's Complaint further alleges that as soon as the federal bankruptcy court in California entered an injunction against the persons of Mr. and Mrs. Read, it clearly usurped its federal statutory powers, and under color of federal law its usurpation became a federal issue in the federal district of Connecticut, since there was a standing order to abstain federal jurisdiction over the matters tried in Connecticut state

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[38] The district court's statement that:

> "... as all defendants in this action are immune from suit by virtue of judicial immunity, defendants' motion to dismiss is granted.";

can not apply to the Defendant United States. The United States, as an entity, is named upon this case under claims separate and distinct from the racketeering allegations against the named defendant judges.

Society should not have to bear the cost of its own incompetent federal officers -- but it must if it is determined that society has benefited from the federal activity giving rise to the damages claimed. Does a plaintiff's civil claim that is estopped by invocation of judicial immunity give rise to an action against the United States under the taking clause of the Fifth Amendment? Is society the beneficiary of the protections afforded by application of the doctrine of "judicial immunity"?

court, entered in December of 1982, by the Connecticut bankruptcy court. See App. pp. 10-14.

Read's premise in bringing this Complaint to the trial court is that the Read's were residents of Connecticut, subject to and protected by the laws of Connecticut, and that they were involuntarily involved as defendants in a state court action filed in a Connecticut state court. The issues asserted by their accuser (Charles Duck) arose exclusively under the common law and the laws of the State of Connecticut. No part of that lawsuit relied upon any provision of title 11 to sustain its validity, and that, as persons whose only involvement with the appointees of the California bankruptcy court was through the fraudulent claims asserted by Duck and others from California in that Connecticut suit, the Reads have been denied the protections to which they are entitled under Connecticut law and the common law, and which are protected by the U.S. Constitution.

Without a forum in which to determine the truth of their allegations, and impartially apply the controlling law to the circumstances created by the body of truth the fact finder may determine, the Reads have been denied their private right to redress. In actual fact, the federal decisions attacked by Read's Amended Complaint, if valid, mean that no innocent citizen may protect himself or his family against federal court bankruptcy appointees, nor may such citizen attempt to employ the agency of federal courts to invoke clearly stated constitutional restraints upon federal usurpation of power, without inviting further damages in the form of sanctions from the very institution society constituted to provide the protections sought by the citizen.

REASONS FOR GRANTING THIS WRIT

Whether a citizen has, or has not, a private right to petition the government for a redress of his grievances in a federal court, when his grievances involve allegations of multiple constitutional transgressions by the courts of the federal government?; is a question of now many thousands across this nation. If the right exists, then the history of this

case is clear that the lower courts in multiple circuits must be so instructed, and mandate issued to compel their duty to hear, and if not, a vast citizenry must then be so instructed, leaving to a then awakened society the determination of the destiny of its federal courts.

Whether allegations of disingenuous acts by judicial officers and agents are allowed to be presented with all supporting evidence to the demanded jury, as fact finder, in its own terms by the claimant in a suit?; and, whether past orders, rulings, findings and mandates, that constitute the subject-matter essence of the complaint, are improperly raised by the government as opposing authority to such presentation?; are the two due process questions deserving consideration and resolution by this Court on behalf of the society it serves.

Whether a series of sua sponte judicial interventions in matters proceeding in the state courts creating an appearance of violations of First Fifth, Seventh and Tenth Amendment limitations upon the powers of the federal government, comprise a question of sufficient grounds for a civil action against the accused judicial offenders and the federal government, arising directly under the constitution, is necessarily to be heard under Article III and **28 U.S.C. §1331**, by a federal district court?; is a question deserving resolution by this court on behalf of the private citizenry of this nation.

CONCLUSION

The Court is not asked to determine any aspect of the merits of Read's underlying Amended Complaint. For that reason it is not included in the Appendix attached hereto.

This Petition for Certiorari should be granted on behalf of a substantial and growing number of American Citizens finding that their private rights, and with them, their means of self preservation, are constructively destroyed by federal judicial officers and appointed federal actors, who with foreknowledge of the impact of their deeds, have consistently favored the personal and private pecuniary interests of court appointed officials and major statutory entities, by denying the

individual citizen the protections of redress, liberty and property, access to a demanded jury, and by means of exercise of authority not arguably within the scope of powers granted to the federal government by the U.S. Constitution.

Only this Court can ultimately defend the Constitution during times when its provisions become subordinated to judicial protection of its court appointees and brethren. An American people of two hundred years ago, have made their request for this Court's consideration of just these very nature of matters, when the framers drafted Article III, of our U.S. Constitution.

At the heart of this petition is the real question whether federal judges and federal courts are in practical terms subject to the provisions of the U.S. Constitution and its just federal law, or have they each and all become elevated above the law? Do we yet maintain our Democracy, or are we now subject to the dominion of judicial whim, caprice, and provable tampering with evidence before the federal courts of this nation? This case presents a clear basis for the legitimacy of these questions, and only this Court may provide the final answer. One way or the other, an awakening society insists these questions be determined.

In short: What opportunity to avoid harm to themselves from the wrongful acts of federal officers and appointees did the Read family ever have, if remedy for the wrongs done was never to have been availed to them?

Respectfully submitted,

Thomas M. Read
P.O. Box, 1794
Bristol, CT 06011-1794
Phone: (203) 582-5361
Fax: (203) 582-6929
Appearing pro se. as
Petitioner

BEST AVAIL-A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-1550

THOMAS M. READ
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: March 8, 1993

PER CURIAM.

DECISION

Thomas M. Read appeals the July 7, 1992 decision of the United States District Court for the District of Connecticut, Civil No. 2:91CV00973, dismissing his complaint. We affirm the district court's dismissal of Mr. Read's action pursuant to Fed. Cir. R. 36. Moreover, because the appeal is both frivolous as filed and frivolous as argued, we award damages under Fed. R. App. P. 38, in the amount of $2,000.00 against Mr. Read. Finally, since Mr. Read persists in abusing the judicial process with repetitive filings without any arguable merit, the Clerk of this court is hereby instructed not to accept any further filings from Mr. Read without prior approval of the motions panel

DISCUSSION

It is a "fundamental precept of common-law adjudication that an issue once determined by a competent court is conclusive." Arizona v. California, 460 U.S. 605, 619 (1983). Therefore, under the principles of res judicata, "[a] final judgment on the merits of an action precludes the parties

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or their privies from relitigating issues that were or could have been raised in that action." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981).

In this case, Mr. Read presents, the same arguments concerning the same facts before this court as he has already litigated to finality in previous actions, merely adding a Little Tucker Act claim, 28 U.S.C. § 1346(a) (2), and claims relating to several other statutes[1] . However, because the Little Tucker Act claim and claims under the other statues "could have been raised in the [previous] action[s]," and because the operative facts are the same, Mr. Read's current action is the same as those previous litigated.

In one of the previous actions, the Second Circuit affirmed the dismissal of a similar action by the district court, Read v. Duck, No. H-89-655 (D Conn. Sept. 11, 1990), cautioning Mr. Read that any future attempts to bring further actions may result in the imposition of sanctions. Read v. Duck, No. 90-6218 (2d Cir. Oct. 30, 1990). In a subsequent appeal of the same district court action, the Second Circuit granted appellee's motion to dismiss the appeal, holding that the arguments raised were completely without merit and imposing sanctions on Mr. Read for filing a frivolous appeal. Read v. Duck, No. 90-6332 (2d Cir. Feb. 6, 1991) (ordering Mr. Read to pay $1,000.00 in damages to appellee's counsel within 10 days).[2]

The instant appeal, involving the same facts and issues, is equally frivolous both as filed and as argued. An

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[1] Mr. Read also relies on the following statutes: the federal question, diversity and bankruptcy statutes, 28 U.S.C. § § 1331, 1332 and 1334; the Federal Tort Claims Act ("FTCA"), 29 U.S.C. § 1346(b); and the federal statute providing jurisdiction for seizures not within admiralty and maritime jurisdiction, 28 U.S.C. § 1356. It is unclear from the record before the court whether Mr. Read previously asserted claims pursuant to these statutory provisions in his first district court action, Read v. Duck, Civil No. H-89-655 (D. Conn. Sept. 11, 1990), aff'd, No. 90-6218 (2d Cir. Oct. 30, 1990).

[2] Mr. Read indicates, in his appeal brief, that he has not paid the damages to date.

appeal is frivolous as filed if "the judgment by the tribunal below was so plainly correct and the legal authority contrary to appellant's position so clear that there really is no appealable issue." Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1579 (Fed. Cir. 1991). An appeal is also frivolous as argued when a party is merely "rearguing frivolous positions for which sanctions had already been imposed." Id. (citing Optyl Eyewear Fashion Int'l Corp. v. Style Cos., 760 F.2d 1045, 1052 (9th Cir. 1985)). Mr. Read's appeal meets both tests. His refusal to heed the warnings of our sister circuit and his persistent filing of repetitive and meritless lawsuits warrant the imposition of sanctions in the present appeal. We therefore aware damages under Fed. R. App. P. 38, in the amount of $2,000.00, which Mr. Read shall be personally liable to pay within 10 days.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS M. READ	)	
VS.	)	2:91 CV 00973 PCD
UNITED STATES OF	)	
AMERICA	)	
et al.	)	

JUDGMENT

The action having come on for consideration of the defendants' motion to dismiss before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Motion to Dismiss, granting the motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut this 13th day of July 1992.

DEVIN F. ROWE, Clerk

By /s/_____
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS M. READ

-vs-

Civil No. 2:91cv00973 (PCD)

UNITED STATES OF AMERICA,ET AL

RULING ON MOTION TO DISMISS

Plaintiff, Thomas Read, pro se, files this action against six federal judges alleging, inter alia, conspiracy to violate 18 U.S.C. § 1961, et seq. ("RICO"), as well as violations of his first, fifth, seventh, and tenth amendment rights. Defendants move to dismiss.

Background

While plaintiff's complaint provides a lengthy description of events leading up to and surrounding these proceedings, those facts relevant to the instant action, presumed to be true for purposes of this motion, are briefly summarized as follows:

Plaintiff alleges that, following an alleged scheme to extort money from plaintiff executed by two lawyers and a court-appointed bankruptcy trustee in California from 1980 through 1986, a Connecticut jury found that the trustee was liable in damages to plaintiff.[1] Complaint ¶ 32-35. Plaintiff further alleges that this property was subsequently "disposed of," constituting a criminal act "encouraged by the federal courts." Complaint ¶ 36. Plaintiff asserts that defendant Judge Jaroslovsky, a United States Bankruptcy Judge for the Northern District of California, enjoined plaintiff and his wife from executing their judgment against the trustee, thereby constituting a "clear usurpation of his trusted authority." Complaint ¶ 52. Plaintiff appealed said injunction to the Court of Appeals for the Ninth Circuit. The presiding panel,

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[1] As plaintiff fails to provide this court with specific dates or locations regarding the occurrence of the aforementioned acts, said information is omitted.

defendant judges Russell, Jones, and Meyers, affirmed the findings of the bankruptcy judge. Plaintiff alleges that "these three judges lied" and insulted the constitution. Complaint ¶ 58. Plaintiff subsequently filed a lawsuit in the District of Connecticut, naming the California judges as co-defendants. Defendant Judge Nevas, after a full hearing, dismissed plaintiff's lawsuit, thereby knowingly "shielding the alleged racketeers from the federal statutory controls upon their own conduct." Complaint ¶ 66. An appeal of the district court's dismissal was subsequently filed with the Court of Appeals for the Second Circuit. Defendant Judge Newman, along with two other panel judges not named in this action, affirmed Judge Nevas's determination and additionally sanctioned plaintiff and his wife for filing said appeal. Plaintiff contends that Judge Newman's actions also exceeded the scope of his authority and constituted "an act by a federal judicial officer (judge) to knowingly and wilfully conceal a fraud or crime perpetrated by private person federal actors, under color of federal law." Complaint ¶ 92. Plaintiff argues that the aforementioned actions, viewed in tandem, formed a conspiracy of "fraud, deceit, dereliction of clear duty, extortion, robbery, intimidation and abuse of judicial discretion." Complaint ¶ 100.

Discussion

A motion to dismiss involves a determination as to whether plaintiff has stated a claim upon which relief can be granted. That standard is articulated more fully in Fischman v. Blue Cross Blue Shield, 755 F. Supp. 528 (D. Conn. 1990).

Defendants move to dismiss asserting that plaintiff has failed to allege personal or subject matter jurisdiction, and noting the doctrine of judicial immunity. It is a firmly established principle of American jurisprudence that "[j]udges of courts of superior or general jurisdiction are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Bradley v. Fisher, 80 U.S. 335 (1871). "Although absolute, judicial immunity only extends to those acts performed in a judge's judicial capacity . . . and a

judge may be subject to suit if he acts in 'clear absence of all jurisdiction over the subject-matter.'" Read v. Duck, Civil No. H-89-655 (D. Conn. Sept. 11, 1990), quoting Dennis v. Sparks, 449 U.S. 24, 31 (1980); Bradley, 80 U.S. at 351. Here, the entire substance of plaintiff's allegations is an objection to decisions rendered by six federal judges, each acting in his judicial capacity. This court has no jurisdiction to examine the merits of those decisions, nor does plaintiff substantiate in any way his conclusory declarations that defendants were acting outside their jurisdiction. Although plaintiff may disagree with or disapprove of these judges' determinations, his contention that each of their decisions, protected absolutely by judicial immunity, rises to the level of a RICO conspiracy is specious at best; at worst, it is without legal and/or factual merit. Accordingly, as all defendants in this action are immune from suit by virtue of judicial immunity, defendants' motion to dismiss is granted.

Conclusion

For the foregoing reasons, defendants' motion to dismiss (document #13) is granted. Plaintiff's several subsequent motions for injunctive relief (documents ##16, 17, 18 and 26) are denied as moot in light of dismissal of this action.

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of July, 1992.

/s/_____

Peter C. Dorsey

United States District Judge

HOFFMAN, KELLY, STOKES & IZMIRIAN
HARVEY W. HOFFMAN
111 Pine Street, Suite 1501
San Francisco, California 94111
Telephone: (415) 397-4100

Attorneys for Defendants

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In the Matter of
NIELS F. JACKSEN, etc., and
SUSAN P. JACKSEN
Debtors

NIELS F. JACKSEN and SUSAN P. JACKSEN,
Plaintiffs
-v-
THOMAS M. READ and SANDRA A. READ,
Defendants

Case No. 1-80-00167
Chapter 11 Proceeding
Adversary Proceeding
1-81-0068

ORDER FOR TRANSFER OF ADVERSARY PROCEEDING

The motion of Thomas M. Read and Sandra A. Read, defendants herein, for transfer of the above-captioned adversary proceeding to the United States Bankruptcy Court for the district of Connecticut, at Bridgeport, Connecticut, having come on regularly for hearing before the undersigned U. S. Bankruptcy Judge on the 18th day of June, 1981, Harvey W. Hoffman of Hoffman, Kelly, Stokes & Izmirian appearing for the defendants and moving parties, and John Poppin and Matthew J. Shier appearing on behalf of the plaintiffs and debtors, and the Court having considered said

motion and the arguments of counsel, and it appearing to the Court that this is a proper case for the entry of the relief requested, and good cause appearing therefore,

IT IS ORDERED that the above-captioned adversary proceeding be, and the same hereby is, transferred to the United States Bankruptcy Court for the District of Connecticut, at Bridgeport, Connecticut, pursuant to Rule 782 of Rules of Bankruptcy Procedure; and

IT IS FURTHER ORDERED that plaintiffs be, and they hereby are, authorized and directed to do any and all acts necessary and proper to effect such transfer.

DATED this 26th day of June, 1981.

/s/_____
CONLEY S. BROWN,
U.S. Brankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:
NIELS F. JACKSEN and
SUSAN P. JACKSEN,
Debtors

NIELS F. JACKSEN and SUSAN P. JACKSEN,
Plaintiffs
v.
THOMAS M. READ and SANDRA A. READ,
Defendants

APPEARANCES
John F. Kavanewsky, Jr., Esq., Busek & Kavanewsky
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Attorney for Plaintiff

Thomas L. Kanasky, Esq., Levin & Charmoy
P.O. Box 862, Bridgeport, Connecticut 06601
Attorney for Defendant

Chapter 11
Case No. 971-1-80-167 (Pending in United States Bankruptcy Court for the Northern District of California
Adv. No. 205-5-81-0246

Alan H. W. Shiff, United States Bankruptcy Judge
MEMORANDUM AND DECISION ON DEFENDANTS' MOTION TO ABSTAIN - 28 U.S.C. § 1471(d)

I.

BACKGROUND

This matter comes before the court on the defendants' Motion to Abstain from hearing a proceeding instituted by the plaintiffs-debtors for damages arising out of the use and occupation of premises formerly owned by the debtors. A

brief summary of the salient events leading to this proceeding will provide the necessary background for this decision.

1. The premises which are the subject of this controversy are located in Ridgefield, Connecticut.

2. On March 9, 1981, the plaintiffs (debtors) filed an adversary proceeding in the United States Bankruptcy Court for the Northern District of California, where their Chapter 11 case is pending.

3. The debtors' complaint, seeking ejectment and damages was transferred to the District of Connecticut at Bridgeport on June 29, 1981.

4. On April 21, 1982, the debtors filed a substituted complaint seeking, inter alia, damages for the "reasonable value of use and occupancy until delivery of possession of the premises plus interest". On May 13, 1982, the debtors amended their substituted complaint to request, inter alia, damages for past rent and for "the reasonable value of the use and occupation by the defendants plus interest". On June 14, 1982, the defendants filed an answer and counterclaim seeking, inter alia, either specific performance in accordance with a lease agreement or damages for fraud. The defendant's first request for relief is now moot since a third party, having obtained relief from the automatic stay, now holds title to the subject property.

II.

ISSUE

The defendants urge the court to abstain from hearing this adversary proceeding on the basis that no bankruptcy questions are presented, the resolution of the issues is entirely dependent upon state statutory and case law and the relationship between this proceeding and the Chapter 11 case is remote and contingent. In that latter connection the defendants contend that the debtors instituted this proceeding as a futile attempt to boot-strap a Chapter 11 reorganization without any realistic expectation that success would provide sufficient funds to achieve that purpose.

The debtors, on the other hand, seek the retention of this proceeding on the basis that the formulation and funding

of their plan depends upon the speedly resolution of their claim which, they contend, is not possible in state court.

The parties agree that this court has jurisdiction over the subject matter of this proceeding by virtue of the broad grant of jurisdiction conferred upon bankruptcy courts by 28 U.S.C. 471(b) and (c).[1] Under that section, this court presently[2] has nonexclusive jurisdiction over "all civil proceedings... arising in or related to cases under Title 11." Bankruptcy courts were, however, permitted under Section 1471(d) to decline to exercise that jurisdiction "in the interest of justice".[3]

Thus, to achieve one of the major objectives of the Bankruptcy Reform Act, namely - the reduction of costly and time consuming litigation over jurisdiction which plagued the former law - Congress gave bankruptcy courts vastly expanded subject matter jurisdiction while, at the same time, the nonreviewable authority to abstain from hearing any

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[1] 28 U.S.C. § 1471

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arise in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall excercise all of the jurisdiction conferred by this section on the district courts.

[2] The constitutionality of this jurisdictional grant was rejected by the United States Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., U.S.__, 102 S.Ct. 2858 (1982) effective October 4, 1982. The effective date of Marathon has been extended to December 24, 1982.

[3] 28 U.S.C. § 1471

(d) Subsection Ob) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arise in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

proceeding in the interest of justice.[4] The question presented is should this court abstain from hearing this proceeding.

III.

DISCUSSION

It has been suggested that the exercise of jurisdiction by bankruptcy courts to the full extent permitted by Section 1471 may impede rather than facilitate the congressional goal of establishing an efficient, convenient and fair bankruptcy judicial system. To relieve docket congestion generated by the vastly expanded jurisdictional grant, Congress provided a means by which bankruptcy courts might abstain "in the interest of justice" from hearing certain proceedings over which they had nonexclusive jurisdiction. In that sense, it has been asserted that the "interest of justice" was intended to include the public interest in an efficient bankruptcy judicial system.[5]

It is recognized that federal trial courts have traditionally been called upon to exercise caution in remanding or abstaining from hearing cases over which they had jurisdiction. See Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976); Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976); Meredith v. City of Winter Haven, 320 U.S. 228 (1943). In view, however, of an express grant of authority to abstain, buttressed by the nonreviewable aspect of that power,[6] it is apparent that Congress specifically intended to assure the availability of bankruptcy courts to hear cases under the Code over which they had exclusive jurisdiction by providing a

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[4] For an excellent discussion of this subject see Reed, Sagar, Granoff, Subject Matter Jurisdiction, Abstention and Removal Under the New Federal Bankruptcy Law, 56 Am. Bankr. L. J. 121 (1982).

[5] See Note, Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings, 59 Tex. L. Rev. 325 (1891); see also Landis v. Norther American Co., 299 U.S. 248, 254 (1936).

[6] It is interesting to note that Congress provided bankruptcy judges with parallel authority to remand cases removed to their courts. See 28 U.S.C. § 1478(d).

means of relieving their dockets of those matters over which they shared jurisdiction with other courts. Accordingly, a motion to abstain should be evaluated in terms of the impact which the challenged proceeding has upon the efficient, convenient and fair administration of the bankruptcy case before the court. If the impact is remote, the public interest in an efficient bankruptcy judicial system would outweigh the interest of the party resisting abstention to a hearing in a bankruptcy court forum.

In the instant proceeding, I find on balance that the debtors' cause of action has at best a speculative relationship to their case. The property out of which the controversy arose is no longer property of the estate. Furthermore any success the debtors might achieve in this proceeding should be discounted by the merits, if any, of the defendants' counterclaim. But even if the debtors did prevail and, in addition, defeated the defendants' counterclaim, there was no showing that such success would provide the funds necessary to finance a confirmable chapter 11 plan. In short, this adversary proceeding was not in any but the most speculative way related to the chapter 11 case pending in the Northern District of California.

Accordingly the defendants' Motion To Abstain is granted and IT IS SO ORDERED.

Dated at Bridgeport, this 15 day of December, 1982.

/s/_____

Alan H. W. Shiff

United States Bankruptcy Judge

SUPERIOR COURT
JUDICIAL DISTRICT OF DANBURY
AT DANBURY

OCTOBER 21, 1986

NO. CV-83-0283376S

CHARLES DUCK, Trustee*
1708 SPRING CREEK DRIVE
SANTA ROSE, CALIFORNIA 95405

ORIGINAL COMPLAINANT
NEILS F. JACKSEN, ET AL
HEALDSBERG, CALIFORNIA 95488

V.

THOMAS M. READ AND
SANDRA A. READ
182 FLORIDA ROAD
RIDGEFIELD, CONNECTICUT 06877

Present: Honorable George N. Thim, Judge

JUDGMENT

This action, by writ and complaint, claiming failure to pay rent and/or use and occupancy, came to this Court on September 27, 1983, and thence to later dates when the parties appeared and were at issue as on file, and when all the evidence having been submitted, the Court thereupon committed the action to the Jury, which returned its verdict as follows:

1. Judgment for the Defendants on the Plaintiff's complaint, and...

2. Judgment for the Defendants Thomas M. Read and Sandra A. Read on their counterclaim in the amount of ten thousand ($10,000.00) dollars against the Plaintiff.

The Court accepted the verdict and entered judgment thereon.

Whereupon it is adjuged that the Defendants Thomas M. Read and Sandra A. Read shall recover of the Plaintiff $10,000.00 damages and costs.

By the Court, (Thim, G.)

/s/_____
Assistant Clerk

Charles Duck, Trustee, substituted real party in interest for original Complainants Neils F. Jacksen, et al.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
IN RE
NIELS F. & SUSAN JACKSEN
DEBTOR(S)

CHARLES DUCK
PLAINTIFF
vs.
THOMAS M. & SANDRA READ
DEFENDANT

BANKRUPTCY NO. 1-80-00167
ADVERSARY NO. 1-88-0097

NOTICE OF HEARING ON APPLICATION FOR REMOVAL AND FOR STATUS CONFERENCE

To: Attorney for Plaintiffs, PHILIP ARNOT
307 No. Street, Eureka, Ca 95501
707-443-6386

Atty for Debtor, THOMAS M. READ
161 Grove St.
Bristol, CT 06010

NOTICE IS HEREBY GIVEN that the hearing on the application of CHARLES DUCK, for removal of the above entitled state court action to determine whether or not this court will take jurisdiction will be heard before the HONORABLE ALAN JAROSLOVKSY, at 9:00 a.m. on 7-15-88 at Santa Rosa, U. S. Bankruptcy Court.

NOTICE IS ALSO FURTHER GIVEN that if the court takes jurisdiction, a Status Conference will be held at the same time and place if all parties to the state court action answered. If all parties have not answered for have not been served, an order may be entered for issuance of summons

setting a time for answer or motion and for Status Conference.

DATED: JUN 29, 1988

PAUL C. KARNEY, JR.,
CLERK

By: /s/
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re
NIELS and SUSAN JACKSEN
Debtors
_____/

CHARLES DUCK, Trustee,
Plaintiff,
v.
THOMAS and SANDRA READ,
Defendants.
_____/

No. 1-80-00167
A.P. No. 1-88-0097

Memorandum of Decision

The relevant facts in this matter are uncontested, and revolve around an infrequently raised, though hardly obscure, point of law. The Court finds it difficult to believe that so much time and effort has been spent by both sides when an hour in the law library would have resolved the matter. The Court, having done the parties' legal research for them, now resolves the dispute as the law mandates.

The background of this dispute is simple. When Charles Duck was appointed as trustee in the above bankruptcy proceedings there was litigation pending Connecticut in which the debtors were plaintiffs and Thomas and Sandra Read were defendants. Pursuant to Bankruptcy Rule 6009, which authorizes the trustee to prosecute or defend any action by or against the debtors. Mr. Duck became a party to the litigation. The Reads filed a cross-complaint against Mr. Duck based on actions of the debtors. The Reads obtained a judgment in their favor on the complaint and a $10,000.00 award against Mr. Duck as trustee on their cross-complaint.

the only dispute here is over the manner in which this judgment is enforced. The Reads are attempting to enforce the judgment against Mr. Duck personally.

The Trustee's arguments concerning the discharge and conversion provisions of the Bankruptcy Code are completely off base. The discharge protects the debtor, not the trustee or the estate. The fact that the case was converted from Chapter 11 to Chapter 7 at some time during the litigation is wholly irrelevant. The only issue here is whether a judgment taken against the trustee in his representative capacity can be enforced against him personally.

Under English law, a receiver or trustee is personally liable for debts incurred during his administration of an estate. He, in turn, can seek indemnification from the estate for all expenses incurred in performing his duties. If this case were in England, the Reads would be justified in enforcing their judgment against Mr. Duck personally.

American federal courts do not follow the English rule. In this country, receivers and trustees are not personally liable for judgments taken against them in their representative capacity; where the trustee is only "officially liable" the judgment is a valid claim against the estate but may not be satisfied from the trustee's personal assets. Rothschild, "Liability Incurred by a Receiver or Trustee in Bankruptcy Conducting a Business," 15 Hastings Law Journal 520, 526 (1964). The American rule was clearly stated by the Supreme Court in McNulta v. Lochridge (1891) 141 U.S. 327, 332:

> Actions against the receiver are in law actions against the receivership or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands.

The same rule applies to trustee in bankruptcy cases. Reading Co. v. Brown (1968) 391 U.S. 471, 477n7; Collier,

Handbook for Trustees and Debtors in Possession (1985), sec. 4.08.

This dispute has arisen because the Reads have failed to understand the simple rule that a judgment taken against a trustee in his official capacity is not enforceable against him personally. While the Court does not know what sort of legal advice the Reads obtained prior to their considerable expenditure of time and expense pursuing Mr. Duck personally, it seems that the Trustee's counsel could have explained this simple fact to the Reads rather than raising totally irrelevant provisions of the Bankruptcy Code.

While the Court sympathizes with the Reads' frustrations, they are fundamentally wrong in supposing that justice requires that they obtain satisfaction of their judgment. Justice requires that the law be applied equally; the Court has no power to ignore the law merely because it may sympathize with one side or the other.

In this case Mr. Duck was authorized by Bankruptcy Rule 6009 to appear in the Connecticut litigation. The law, as laid down by this nation's highest Court, is that where the trustee's acts are authorized any judgment taken against him is not enforceable against him personally. This Court must therefore rule in favor of Mr. Duck.

It is doubtful that the Reads can recover anything on their judgment at this point, as the bankruptcy case has been closed; This is a matter in which the Reads need expert advice. Regardless of whether recovery is possible, the only permissible source of recovery is the bankruptcy estate, over which this Court exercises exclusive jurisdiction pursuant to 28 U.S.C. section 1334(a). Accordingly, no action may be taken by the Reads anywhere but in this Court to enforce their judgment.

Pursuant to Bankruptcy Rule 9021, a separate judgment will be entered permanently barring the Reads from enforcing the judgment against Mr. Duck personally or proceeding to enforce the judgment in any way in any court other than this court.

Dated: July 16, 1988

/s/_____
Alan Jaroslovsky
U.S. Bankruptcy Judge

JUDGMENT ENTERED ON JUL 18, 1988

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re
NIELS and SUSAN JACKSEN,
Debtors.
_____/
CHARLES DUCK, Trustee,
Plaintiff,
v.
THOMAS and SANDRA READ,
Defendants.
_____/

No. 1-80-00167
A.P. No. 1-88-0097

PERMANENT INJUNCTION

For the reasons stated in the Memorandum of Decision filed herewith, it is

ORDERED, ADJUDGED AND DECREED that defendants Thomas M. Read and Sandra A. Read, and their agents, are hereby permanently enjoined from taking any action to enforce the judgment they obtained in the above action, originally known as Connecticut Superior Court action number CV83-0283376S and also known as California Municipal Court Action 99843, against Charles Duck personally; and it is further

ORDERED, ADJUDGED and DECREED that said persons shall take no actions whatever to enforce said judgment against any person or entity in any manner except by leave of this Court.

/s/_____

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In Re	BAP No. NC-88-1680-MeRJ
NIELS & SUSAN JACKSEN,	BK No. 1-80-00167
	Adv. No. 1-88-0096
Debtors.	
THOMAS & SANDRA READ, Appellants,	OPINION
v.	
CHARLES DUCK, TRUSTEE Appellee	

Submitted Without Oral Argument on May 5, 1989
Filed: SEP 27 1989
Appeal from the United States Bankruptcy Court
for the Northern District of California
Hon. Alan Jaroslovsky, Bankruptcy Judge, Presiding
Before: MEYERS, RUSSELL and JONES, Bankruptcy Judges
MEYERS, Bankruptcy Judge:

I

Appellants ("Reads"), appearing pro se, appeal from: (1) the bankruptcy court's order removing their litigation against the trustee from Connecticut state court to the Bankruptcy Court for the Northern District of California and (2) the bankruptcy court's issuance of a permanent injunction barring the Reads from either enforcing their judgment against the trustee personally or from proceeding to enforce the judgment in another court. We AFFIRM.

II

FACTS

The debtors, ("Jacksens"), filed for Chapter 11 relief on March 4, 1980. On November 28, 1984, the case was

converted to Chapter 7 and a trustee, Charles Duck ("Trustee"), was appointed. During the pendancy of the Chapter 11 proceeding, the Jacksens brought an action in Connecticut state court against the Reads for pre-petition rent allegedly owed them. The Reads then filed a counterclaim. The Trustee in the bankruptcy case, as the real party inn interest, was substituted in by order of the Connecticut court and a second revised complaint was filed naming him in his official capacity as trustee for the Jacksen estate. Ultimately, the Reads obtained a judgment in their favor on the complaint and a $10,000 awarded against the Trustee on their cross-complaint. The Reads had the Connecticut judgment entered as a sister-state judgment against the Trustee in Sonoma County Municipal Court. The Trustee then submitted a motion to vacate the entry and applied for removal of the action to the Bankruptcy Court for the Northern District of California where the debtors' original petition was filed. A hearing was held on this motion on July 15, 1988. Thereafter, the court issued a permanent injunction prohibiting the Reads from taking any action to enforce the Connecticut judgment against the Trustee personally and enjoining them from enforcing the judgment against any person without leave of the bankruptcy court. This appeal followed.

III

DISCUSSION

A. Jurisdiction

Pro se briefs are held to a less strict standard than those drafted by a lawyer. Bonner v. Lewis, 857 F.2d 559, 563 (9th Cir. 1988). See also Akao v. Shimoda, 832 F.2d 119, 120 (9th Cir. 1987). Courts are to make reasonable allowances for pro per litigants and to read pro se papers liberally. McCabe v. Arave, 827 F.2d 634, 640 n.6 (9th Cir. 1987). Although it is difficult to decipher the precise issue the Reads attempt to raise in their briefs, a liberal reading suggests that they are challenging the bankruptcy court's authority to enter its injunction. The Reads maintain the removal action before the bankruptcy court was not a "core"

proceeding and therefore, the court lacked authority to enter its injunction. This issue is raised for the first time on appeal.

As a general rule, an appellate court will not consider an issued raised for the first time on appeal. Community Elec. Service v. National Elec. Contr., 869 F.2d 1235, 1241 (9th Cir. 1989); In re Film Ventures Intern, Inc., 89 B.R. 80, 85 (9th Cir. BAP 1988). However, it has the discretionary power to do so in some narrow circumstances. In re Wind Power Systems, Inc., 841 F.2d 288, 290 n.1 (9th Cir. 1988); Grauvogel v. C.I.R., 768 F.2d 1087, 1090 (9th Cir. 1985). We do so here because justice will be better served if we address all of the pro se litigants' contentions.

In the case before us, we are convinced that the bankruptcy court had jurisdiction to issue its permanent injunction. Injunctions are authorized under 11 U.S.C. Section 105 (a), which empowers the bankruptcy court to issue any order necessary or appropriate to carry out the provisions of the Code, including restraining actions. In re Johns-Manville Corp., 801 F.2d 60, 63 (2d Cir. 1986). See generally In re Chinichian, 784 F.2d 1440, 1443 (9th Cir. 1986). Section 105(a) does not, however, broaden the bankruptcy court's jurisdiction, which must be established separately under 28 U.S.C. Sections 157 and 1334. See In Re Johns-Manville Corp. supra, 801 F.2d at 63.

Bankruptcy courts have jurisdiction to "hear and determine . . . all core proceedings . . . arising in a case under title 11." 28 U.S.C. Section 157(b)(1) (Supp. II 1984). Here, we conclude that the bankruptcy court relied for jurisdiction on Section 157 (b)(2)(A), as the matter was a "core" proceeding, encompassing "[m]atters concerning the administration of the estate." See In re Elsinore Shores Associates, 91 B.R. 238, 255 (N.J. 1988). An action enjoining the Reads from attempting to enforce a judgment against the trustee personally is, by its nature, a "matter concerning the administration of the estate" and therefore, was a "core" proceeding. 28 U.S.C. Section 157(b) (2) (A) (Supp. II 1984). Thus, our conclusion that the bankruptcy

court had jurisdiction to enter its injunction is inescapable. See In re Johns-Manville Corp., supra, 801 F.2d at 64.

B. Derived Judicial Immunity

We review factual decisions of the trial court based on the clearly erroneous standard. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-76 (1985) (describing clearly erroneous review generally). See also In re Reddington Investments Ltd. Partnership - VIII, 90 B.R. 429, 430 (9th Cir. BAP 1988); Matter of Torrez, 63 B. R. 751, 753 (9th Cir. BAP 1986), aff'd 827 F.2d 1299 (9th Cir. 1987).

The Reads argue that the bankruptcy court erred in permanently enjoining them from prosecuting their judgment against the Trustee. They assert that the trustee is personally liable for the judgment taken against him in his representative capacity as Trustee for the Jacksens. Their contention lacks merit.

The courts have recognized that "judicial immunity not only protects judges against suit from acts done within their jurisdiction, but also spreads outward to shield related public servants, including . . . trustee in bankruptcy . . .." Bennett v. Williams, 87 B.R. 122, 123 (S.D. Cal. 1988). See Wickstrom v. Ebert, 585 F.Supp. 924, 934 (E. Wis. 1984). That immunity, however, is not unlimited.

The Ninth Circuit of Appeals in In re Cochise College Park, Inc., 703 F.2d 1339, 1357 (9th Cir. 1983), stated that a bankruptcy trustee may be held liable for negligent as well as intentional conduct pertaining to duties placed on him by law. See also Mosser v. Darrow, 341 U.S. 267 (1951) (a bankruptcy trustee may protect himself from personal liability by seeking instruction from the court). Other courts have clarified which actions may or may not be clothed in the trustee's blanket of immunity by observing that "[a] trustee has immunity only if his actions are within the scope of the authority conferred upon him by statute or the court." In re Tucker Freight Lines, Inc., 62 B.R. 213, 217 (W.Mich. 1986). See also Weissman v. Hassett, 47 B.R. 462, 466 (S. N.Y. 1985). This circuit has adopted a similar rationale stating that

a trustee or an official acting under the authority of the bankruptcy judge is entitled to derived judicial immunity because he is performing an integral part of the judicial process. Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986). See also Boullion v. McClanahan, 639 F.2d 213, 214 (5th Cir. 1981). Therefore, based on the ninth Circuit's Cochise holding, it follows that a trustee, who obtains court approval for actions under the supervision of the bankruptcy judge, is entitled to derived immunity. Boullion, supra, 639 F.2d at 214. See also In re XRX, Inc. 77 B.R. 797, 798 (Nev. 1987). See also, Tiller, Personal Liability of Trustee and Receivers in Bankruptcy, 53 Am. Bankr.L.J. 75, 98 (Winter 1978).

The Reads maintain that the judgment they obtained against the Trustee, in his representative capacity as trustee for the Jacksens' Chapter 7 estate, can be enforced against the Trustee personally. Their argument, however, does not comport with either statutory authority or published case law.

It is well settled that the trustee in bankruptcy is an officer of the appointing court. Courts other than the appointing court have no jurisdiction to entertain suits against the trustee, without leave the from appointing court, for acts done in an official capacity and within his authority as an officer of the court. See Barton v. Barbour, 104 U.S. 126, 136-37 (1881); Leonard v. Vrooman, 383 F.2d 556, 560 (9th Cir. 1967). A limited exception to this rule exits under 28 U.S.C. Section 959(a) which provides that trustees may be sued without leave of the court appointing them, with respect to any of their transactions "in carrying on business connected with such property." A trustee who appears merely to prosecute and defend claims against the estate is not "carrying on business" as the term has been judicially interpreted. Austrian v. Williams, 216 F.2d 278, 285 (2d Cir. 1954). See also 4 Collier on Bankruptcy ¶ 721.05[1] at 721-9 to 721-13 (15th Ed. 1988).

Further, Bankruptcy Rule 6009 authorizes a trustee, with or without court approval, to prosecute or enter an appearance and defend any pending action or proceeding by

or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal. From the facts before us, it is clear that the Reads were well aware of the capacity in which the Trustee appeared in the litigation. In fact, the second amended complaint establishes that the Trustee appeared in his representative capacity as trustee for the Jacksen estate. The trustee was substituted into the Connecticut litigation merely to prosecute the Jacksens' claim and to defend the counterclaims. Moreover, the Reads did not attempt to seek judgment against the Trustee individually, but only in his capacity as trustee. The Reads sought to hold the Trustee personally liable for the first time when they attempted to collect on the judgment. Here, it cannot be said that there was any misunderstanding on the part of the Reads as to the Trustee's role in the litigation. It is therefore axiomatic that the Trustee, "as a trustee in bankruptcy [and] as an official acting under the authority of the bankruptcy judge, is entitled to derived judicial immunity because he is performing an integral part of the judicial process." Lonneker, supra, 804 F.2d at 1097.

Sound policy also mandates immunizing the trustee. The possibility that we would hold trustees personally liable for judgments rendered against them in their representative capacity would invariably lessen the vigor with which trustees pursue their obligations. Immunity is essential because, as Judge Learned Hand noted, "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but he most resolute, or the most irresponsible, in the unflinching discharge of their duties." Gregoire v. Biddle, 177 F.2d 579, 581 (2d cir. 1949).

Thus, a finding of derived judicial immunity in this instance does not deprive the Reads of their remedy but merely furthers the policies of the Code. Bennett, supra, 87 B.R. at 125. Accordingly, we hold that the trustee, acting under the authority of the court, is entitled to derived judicial immunity. Boullion, supra, 639 F2d at 214.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
THOMAS AND SANDRA READ
v.
CHARLES DUCK, ET AL.:

Civil No. H-89-655 (AHN)

RULING ON DEFENDANTS' MOTIONS TO DISMISS

The plaintiffs in this action, Thomas and Sandra Read ("Reads"), are judgment creditors of a bankrupt estate, and have unsuccessfully attempted to enforce that judgment against the estate and the estate's bankruptcy trustee personally. See In re Jacksen, 105 Bankr. 542 (Bankr. 9th Cir. 1989). The plaintiffs allege that the defendants conspired to hinder the collection of their judgment, and have violated their civil rights. The Reads have filed suit against the following persons in their individual and official capacities: the Honorable Conley S. Brown, formerly Judge of the United States Bankruptcy Court for the Northern District of California; Robert Hill, formerly Deputy Clerk of the United States Bankruptcy Court for the Northern District of California and law clerk to Judge Brown; Charles Duck court appointed bankruptcy trustee; Philip Arnot, the bankruptcy trustee's court appointed counsel; and John Poppin, the court appointed attorney of the debors in possession. All defendants, except Duck, have filed motions to dismiss pursuant to Rules 12(b) (2), 12(b) (3), 12(b) (5) and 12(b) (6) of the Federal Rules of Civil Procedure. For the following reasons, the instant suit is dismissed as to all named defendants.

I.

A. Factual Background

The following facts have been determined by the plaintiffs' Amended Complaint and attached exhibits because the pleader's allegations are taken as true for the purpose of

resolving motions to dismiss. For the sake of clarity and brevity, however, those allegations which were stated as conclusions of law have been omitted.

In February, 1980, the Reads entered into a contract with Neils and Susan Jacksen ("Jacksens") to purchase the Jacksens' home located at 182 Florida Road in Ridgefield, Connecticut ("Connecticut Property"). On March 4, 1980, the Jacksens filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California ("California Bankruptcy Court"). Judge Connelly S. Brown, formerly Bankruptcy Court Judge for the Northern District of California ("Judge Brown"), and a defendant in the instant case, presided over this matter. Judge brown appointed defendant John Poppin ("Poppin") as counsel to the Jacksens in their capacity as debtors in possession.

Although title to the Connecticut Property had not been closed, the Reads took possession on May 1, 1980, and paid rent pursuant to the terms of the sale contract. A dispute concerning the rent ensued, and in March 1981 the Jacksens filed an adversary proceeding against the Reads for pre-petition rents in the California Bankruptcy Court. The Jacksens' complaint, seeking ejectment and damages, was transferred to the United States Bankruptcy Court for the District of Connecticut in Bridgeport in June 1981. In April 1982 the Jacksens filed a substituted complaint in the removed suit in the Connecticut Bankruptcy Court. In December 1982, however, the Connecticut Bankruptcy Court abstained from hearing the case, determining that the suit had, "at best[,] a speculative relationship" to the Jacksen bankruptcy. In re Jacksen (971-1-80-167) (Bkrtcy. D. Conn.) (Shiff, J.) (Memorandum and Decision on Defendant's Motion to Abstain - 28 U.S.C. § 1471(d) at 5.)

Meanwhile, the Jacksens abandoned the Connecticut Property. The mortgagee subsequently sold the foreclosed real estate to the Reads in August 1982. The Jacksens, nevertheless, continued to attempt to recover the disputed rent in court. In September 1983 the Jacksens brought suit

against the Reads in Connecticut Superior Court at Danbury and obtained an ex parte attachment on the Connecticut Property. The Jacksens were represented by a Connecticut attorney, John F. Kavenewsky, Jr. ("Kavenewsky").

On December 3, 1984, while the Connecticut State Court suit was pending, the Jacksens' Chapter 11 reorganization was involuntarily converted into a Chapter 7 liquidation. Judge Brown appointed defendant Charles Duck as the bankrupt estate's trustee ("trustee" or "Duck"). Although the trustee was not substituted as the real party in interest in the Connecticut State Court suit until May 1986, the trustee was aware of the pending suit, and acquired appropriate court appointed counsel.

Judge Brown granted Duck's request to have Kavenewsky represent him as trustee in the Connecticut State Court suit. The plaintiffs allege that the trustee, through Kavenewsky, knowingly tendered a forged document to the Connecticut State Court. The document, bearing the seal of the California Bankruptcy Court, is titled "Ex Parte Application for Order Appointing Special Counsel Thereon," and states that Kavenewsky would represent Duck as trustee in the Connecticut State Court suit. The plaintiffs allege that the document was forged by defendant Robert Hill ("Hill"), formerly Judge Brown's law clerk and Deputy Clerk of the California Bankruptcy Court. The plaintiffs do not allege that Kavenewsky was not appointed to serve as the trustee's counsel, only that the aforementioned document was forged.

The Reads counterclaimed against the trustee in the Connecticut State Court suit for "willful and malicious fraud in the administration of Jacksens' bankruptcy." Amended Complaint at ¶ 37. In September 1986, Judge Brown appointed defendant Philip Arnot ("Arnot") as counsel for the trustee. In his application for appointment of counsel, Duck stated that Arnot would 'represent [the] Trustee in reviewing and overseeing special litigation pending in Connecticut." Application for Appointment of Counsel and Affidavit of Counsel at 2. The Reads eventually obtained a judgment in their favor on the original complaint, and prevailed on their

counterclaim. In October 1986 a judgment was entered in their favor for $10,000 ("Connecticut Judgment").

The plaintiffs' attempts to collect the Connecticut Judgment form the core of the instant case. In December 1986 the Reads returned to California Bankruptcy Court to enforce the Connecticut Judgment against the Jacksen estate. Judge Alan Jaroslovsky ("Judge Jaroslovsky"), a defendant in the instant action, succeeded Judge Brown in the California Bankruptcy Court. Judge Jaroslovsky denied the Reads' claim without prejudice because the Jacksen estate had no assets.

Unable to proceed against the Jacksen estate, the Reads attempted to enforce the Connecticut Judgment against the trustee personally. In December 1987 the Reads registered the Connecticut Judgment as a sister state judgment in Sonoma County Municipal Court in Santa Rosa, California. Defendant Arnot, the trustee's court appointed counsel, filed a motion to vacate the judgment. In March 1988, the Municipal Court vacated the Connecticut Judgment and the Reads appealed the ruling.

Arnot subsequently filed a petition to reopen the Jacksen Bankruptcy in the California Bankruptcy Court, and also sought to remove the Reads' suit in Municipal Court seeking enforcement of the Connecticut judgment to the California Bankruptcy Court. After reopening the Jacksen bankruptcy, Judge Jaroslovsky determined that the Connecticut Judgment was only valid against the Jacksen estate and Duck in his capacity as trustee. Judge Jaroslovsky enjoined the Reads from attempting to enforce the Connecticut Judgment against Duck personally. The court also issued an injunction requiring the Reads to obtain the court's permission before attempting to enforce the Connecticut Judgment against any other person. The Reads appealed, and the Bankruptcy Appellate Panel for the Ninth Circuit affirmed Judge Jaroslovsky's ruling. In re Jacksen, 105 Bankr. at 544-45.

B. Procedural History

The Reads filed suit against the aforementioned defendants on October 6, 1989, and the original Complaint was replaced by an Amended Complaint on October 30, 1989. The 124 paragraph Amended Complaint alleges that the defendants conspired to hinder the collection of the Reads' Connecticut Judgment, and sets forth ten separate claims for relief. The plaintiffs allege that the defendants acted under color of law and violated the plaintiffs' civil rights pursuant to seven separate sections of the United States Code, the Constitution, and the 5th, 7th and 14th Amendments. The plaintiffs also set forth two RICO claims, and allege that the defendants have violated several provisions of the Connecticut General Statutes. The plaintiffs also pray for a Declaratory Judgment stating that the Connecticut Judgment is enforceable against Duck personally.

Defendant Arnot was dismissed absent objection on April 17, 1990, but this dismissal was set aside pursuant to Federal Rule of Civic Procedure 60 on May 18, 1990. All defendants, except Duck, have filed motions to dismiss pursuant to Rule 12(b). As Duck has not filed any motions to dismiss, the term "defendants" will refer to the defendants who have made motions to dismiss.

II.

Discussion

A. Standard of Review

Motions to dismiss are determined by reference to the pleadings, which are taken as true for purposes of the motion. United States v. Mississippi, 380 U.S. 128, 143 (1965); Fusco v. Connecticut, 815 F.2d 201, 202 (2d Cir. 1987), cert. denied, 484 U.S. 849 (1987) (citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409. 411 & n.2 (1986). All allegations contained in the complaint are "construed favorable to the pleader[,]" Scheuer v. Rhodes, 416 U.S. 232, 236, and a complaint is not dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (citing Conley v. Gibson, 355 U.S. 41, 45-6 (1957)). For at

this stage of the litigation, the court is not concerned with whether "the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Id.

B. Personal Jurisdiction

The defendants, pursuant to Rule 12(b) (2), challenge the plaintiffs' allegation that the court has personal jurisdiction over them. In order to prevail at this stage of the litigation "the plaintiff need persuade the court only that its factual allegations constitute a prima facie showing of jurisdiction." Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F. 2d 194, 197 (2d Cir. 1990). Applying the minimum contacts standard as set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny, however, the plaintiffs have not alleged a prima facie case.

A federal court has personal jurisdiction over those defendants who have established sufficient "contacts, ties or relations" with the state in which the court sits. International Shoe, 326 U.S. at 319. Any unilateral activity taken by the plaintiff does not affect a minimum contacts analysis, because the defendant must "create a 'substantial connection' with the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)-(quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)) A court may also exercise personal jurisdiction over a party who has consented to the court's jurisdiction. This consent may be express, as in the form of a contract, National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964), or implied, as is the case when a party appoints an agent within the forum state to received service of process. Id. at 315-16. Defendants are also subject to suit in any state with which they have "continuous and systematic" contact. Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 438 (1952).

The plaintiffs do not allege that any of the parties reside in, or have ever visited, Connecticut. Nor do the plaintiffs allege that any defendant has consented to defend a suit in the District of Connecticut. The Reads were allegedly

subjected to a conspiracy which took place in California, and the conspiracy's alleged aim was to impede the Reads' ability to enforce a judgment in California. The Reads do allege, however, that defendant Arnot conducted business in Connecticut so as to make him subject to suit in this state.

The factual allegations supporting the plaintiffs' assertion of personal jurisdiction, however, do not suffice to create a prima facie case. The business conducted consists of two telephone conversations between Arnot and Read. Read was in Connecticut at the time, and these parties discussed the suit in Connecticut State Court. This limited contact does not represent a "substantial connection" with Connecticut. McGee, 355 U.S. at 220, 223 (1957). In a case somewhat similar to the instant suit, the defendant's only contact with the forum state was a telephone call with the plaintiff. Fox v. Boucher, 603 F. Supp. 216, 219 (S.D.N.Y. 1985). The court summarily concluded that this contact "clearly would not satisfy the 'minimum contacts' test for [personal] jurisdiction under the due process clause of the Constitution." Id. at 219.

Accordingly, the court grants defendants' motions to dismiss pursuant to Rule 12(b) (2).[1]

C. Venue

All defendants seek dismissal pursuant to Rule 12(b) (3), stating that venue does not exist in the District of Connecticut. Although no hornbook maxim states which party bears the burden of proof with regard to a Rule 12(b) (3) motion, the weight of authority places the burden upon the plaintiff. Pocahontas Supreme Coal v. National Mines Corp., 90 F.R.D. 67, 69 (S.D.N.Y. 1981); Bartholomew v. Virginia Chiropractors Ass'n, Inc., 612 F.2d 812, 816 (4th Cir. 1979), cert denied, 446 U.S. 938 (1980); 5A C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1352, at 263-65 (1990). There is "little justification for distinguishing

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1 In fact, it appears difficult to understand how the court could possibly have jurisdiction over defendant Hill. Mr. Hill died several months before the complaint was filed.

between" Rule 12(b) (2) and 12(b) (3) motions to dismiss, with regard to placement of the burden of proof, because "It is the plaintiff's obligation to institute his action in a permissible forum, both in terms of jurisdiction and venue." Id. at 265. Consequently, as a plaintiff need only present a prima facie case of personal jurisdiction to prevail against a 12(b) (2) motion to dismiss, Ball, 902 F.2d at 197, the Reads must establish a prima facie case of venue.

The plaintiffs assert that venue exists in the District of Connecticut pursuant to 28 U.S.C. § 959(a) and 1409 (e). Venue does not properly lie in this district pursuant to 28 U.S.C. § 959 (a), as this section concerns the liability of "[t]rustees, receivers or managers of any property, including debors in possession[.] 28 U.S.C. § 959 (a). This statute simply does not furnish venue, and the second circuit has stated that § 959 (a) "was not intended to serve as carte blanche for creditors seeking to sue debors-in-possession in a forum of the creditors' choosing." Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 56 (2d Cir. 1976), cert denied, 429 U.S. 1093 (1977).

Section 1409 (e), however, does address the '[v]enue of proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. § 1409. This statute states that a claim may be brought in any district in which the plaintiff "under applicable nonbankruptcy venue provisions, [may] have brought an action on such claim, or in the district court in which such case is pending." 28 U.S.C. § 1409 (e).

The plaintiffs assert claims under state and federal law, and therefore this court does not have subject matter jurisdiction solely due to diversity of citizenship. The applicable nonbankruptcy venue provision is 28 U.S.C. § 1391 (b), which provides that a "civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." 28 U.S.C. § 1391 (b).

The plaintiffs do not allege that any defendant resides in Connecticut. The claim did not arise in Connecticut, for as

previously noted, the Reads were allegedly subjected to a conspiracy in California, and the conspiracy's alleged aim was to impede the Read's ability to enforce a judgment in that state. Therefore, the defendants' motions to dismiss are granted pursuant to Rule 12 (b) (3).

D. Insufficiency of Process

Defendant Poppin seeks dismissal pursuant to Rule 12 (b) (5), stating he was not properly served with the plaintiffs' summons and complaint. A California Deputy Sheriff served Poppin with the plaintiffs' Amended Complaint and a summons on December 28, 1989. This service, however, was not in accordance with Rule 4 (c), Fed. R. Civ. P. Rule 4 (c) (2) (C) (ii) states that service of process may be made by "mailing a copy of the summons" to the defendant. Fed. R. Civ. P. 4 (c) (2) (C) (ii). The plaintiffs do not allege that service was made in this manner.[2]
The plaintiffs could have served Poppin pursuant to Rule 4 (c) (2) (C) (i), and used Connecticut's Long-Arm Statute, Conn. Gen. Stat. § 52-59b. The plaintiffs, however, did not comply with this statute as the Connecticut Secretary of State was not served with the summons and Amended Complaint. Therefore, the plaintiffs' Amended Complaint is dismissed with regard to defendant Poppin pursuant to Rule 12 (b) (5).

After carefully reviewing the record, the court has discovered that Duck was not served with the Amended Complaint and summons within 120 days after the filing of the complaint, in accordance with Rule 4 (j), Fed. R. Civ. P., even though at the time the complaint was filed the plaintiffs, who

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2 Even if Poppin had received service by mail in California, that service of process would be invalid. For although Rule 4 (c) (2) (C) (ii) appears on its face to allow mail service beyond a state's borders, the second circuit, in Datskow v. Teledyne, Inc. 899 F.2d 1298 (2d Cir. 1990), held that the service by mail provisions of Rule 4 (c) are subject to the constraints of Rule 4 (f). Id. at 1302. Therefore, as Rule 4 (f) limits service to the territorial boundaries of the state in which the district court sits, Fed. R. Civ. P. 4 (f), service by mail to Poppin in California would not have been adequate service of process.

are not pro se, were represented by counsel. In fact, Duck has never made an appearance in the instant suit. Moreover, the plaintiffs have had ample opportunity to demonstrate that there was good cause why this potential defendant was not served, but have failed to present even a scintilla of evidence to explain the failure of service. Thus Duck is not properly a party in the instant case. Leonhard v. United States, 633 F.2d 599, 608-09 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981) (citing Ferguson v. Bartel Brewing Co., 284 F.2d 855, 857 (2d Cir. 1960) (a codefendant who had not been served as "not a party to the case".)) Therefore, the instant action is dismissed with regard to Duck for lack of jurisdiction,[3] and for failure to state a claim upon which relief can be granted,[4]

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3 The second circuit has held that "when . . . the action is dismissed as to all defendants who have been served and only unserved defendants 'remain,' . . . there is no reason for Rule 54 (b) to preclude the immediate and automatic entry of a final judgment since there is no reason for believing there will be any further adjudications in the action, or, therefore, for holding the dismissal subject to revision." Leonhard v. United States, 633 F.2d 599, 609 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981). In the instant case, the fact that Duck has been dismissed for lack of service does not, therefore, preclude a final judgment from being entered pursuant to Rule 54 (b), Fed. R. Civ. P.

4 A district court has the authority, pursuant to its own motion, to "dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related." Silverton v. Dept. of Treasury, 644 F.2d 1341, 1345 (9th Cir.), cert denied, 454 U.S. 895 (1981) (citing Rogers v. Fuller, 410 F.Supp. 187, 192 (M.D.N.C. 1976); Walner v. Friedman, 410 F. Supp. 29, 34 (S.D.N.Y. 1975); Piemonte v. Chicago Board Options Exch., Inc., 405 F. Supp. 711, 718 (S.D.N.Y. 1975)). The claims against Duck and the defendants who have filed motions to dismiss are "integrally related" because the plaintiffs allege that Duck and these defendants engaged in a single conspiracy to hinder the enforcement of their Connecticut Judgment. Furthermore, defendants Duck and Arnot occupy similar positions with regard to the instant suit, for Arnot served as Duck's counsel in his capacity as trustee, and both participated in the administration of the bankrupt estate.

Considering that dismissing a suit sua sponte "may be . . . hazardous," Tamari v. Bache & Co. S.A.L., 565 F.2d 1194, 1198 (7th

pursuant to Rule 12 (b) (6), Fed. R. Civ. P., since Duck enjoys immunity from suit as a court appointed bankruptcy trustee.[5]

Cir. 1977), cert denied, 435 U.S. 905 (1978), courts approach this task "with great caution. Boddie v. American Broadcasting Co., Inc., 731 F.2d 333, 336 n.2 (6th Cir. 1984), cert denied, __ U.S. __, 110 S.Ct. 737 (1990). Yet viewing the Amended Complaint in a light most favorable to the plaintiffs, they have failed to state a claim upon which relief can be granted with regard to Duck. See, e.g. Leonhard V. United States 633 F.2d 599, 609 n.11 (2d Cir. 1980) ("The district court has the power to dismiss a complaint sua sponte for failure to state a claim."), cert. denied, 451 U.S. 908 (citing Robins v. Rarback, 325 F.2d 929 (2d Cir. 1963), cert, denied, 379 U.S. 974 (1965)). See also Whitmore v. Maggio, 742 F.2d 230, 236, (5th Cir. 1984) (upholding district court's sua sponte dismissal for failure to state a claim); Silverton, 644 F.2d at 1345 (upholding district court's sua sponte dismissal of first amended complaint and action, with prejudice); Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3rd Cir. 1980) (upholding district court's sua sponte dismissal for failure to state a claim; Tamari, 565 F.2d at 1194) (upholding district court's sua sponte dismissal where defendants did not file motion to dismiss, cert. denied, 435 U.S. 905 (1978); 5 C. Wright and A. Miller, Federal Practice and Procedure:Civil § 1357, at 593 (1969) ("Even if a party does not make a formal motion, the court on its own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim.").

[5] The Bankruptcy Appellate Panel of the Ninth Circuit in In re Jacksen, 105 Bankr. 542 (Bankr. 9th Cir. 1989), examined whether the trustee, Charles Duck, was liable to suit for his administration of the Jacksen estate. The appellate panel determined that the trustee acted with the approval of the California Bankruptcy Court, and properly prosecuted and defended claims against the estate. Id. at 545. Since the trustee's activity was an "integral part of the judicial process," the court concluded that the trustee was entitled to derived judicial immunity. Id. (quoting Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986)). The plaintiffs may not relitigate the issue of the trustee's immunity, as it was fully and fairly litigated in the California Bankruptcy Court, and on appeal. See Parklane Hosiery Co v. Shore, 439 U.S. 322, 326 (1978). Duck is thus immune with respect to the instant suit because the plaintiffs' allegations solely involve his administration of the Jacksen estate.

E. Immunity

The defendant bankruptcy judges, Jaroslovsky and Brown, assert that they enjoy judicial immunity with regard to the instant case, and seek dismissal with prejudice pursuant to Rule 12 (b) (6). "The doctrine of judicial immunity has been an established principle in American jurisprudence since Bradley v. Fisher, 80 U.S. 335 (1872)," Green v. Maraio, 722 F.2d 1013, 1016 (2d Cir. 1983), and safeguards a judge's ability to "exercise . . . independent judgment about the merits of a case . . .." Dennis v. Sparks, 449 U.S. 24, 31 (1980) (citations omitted). The Bradley Court set forth the parameters of judicial immunity, as "judges of courts of superior or general jurisdiction are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Bradley, 80 U.S. at 351. The Court noted that "[i]f civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away." Id. at 348. Although absolute, judicial immunity only extends to those acts performed in a judge's judicial capacity, Dennis, 449 U.S. at 27, and a judge may be subject to suit if he acts in clear absence of all jurisdiction over the subject-matter." Bradley, 80 U.S. at 351; Green, 722 F.2d at 1017.

The plaintiffs' allegations of illegal activity by Judges Jaroslovsky and Brown essentially restate the judges' respective decisions in the Jacksen bankruptcy. The plaintiffs view those acts, however, in the context of an alleged conspiracy. The plaintiffs' alleged conclusions of law notwithstanding, the judges had subject matter jurisdiction over the Jacksen bankruptcy and both acted within their respective judicial capacities. In re Jacksen, 105 Bankr. at 544. Therefore, the judges enjoy immunity with regard to the instant suit, and the plaintiffs' suit with regard to both is dismissed with prejudice pursuant to Rule 12 (b) (6).

Judicial immunity not only protects judges, but also shields those persons who provide services required by the judicial process. Wickstrom v. Ebert, 585 F. Supp. 924, 934 (E.D. Wis. 1984). Defendant Hill, formerly Deputy Clerk of the California Bankruptcy Court, asserts that he enjoys derived judicial immunity, and is immune from the instant suit. The plaintiffs allege that Hill forged an order issued by Judge Brown, and that this forgery was presented to the Connecticut State Court. Although court clerks enjoy derived judicial immunity, this immunity only extends to their discretionary or quasi-judicial acts. A clerk is only entitled to qualified immunity with regard to ministerial duties, such as provided copies of a judge's ruling. Marty's Adult World of New Britain, Inc. V. Guida, 453 F. Supp. 810, 816 (D.Conn. 1978) (Daly, J.). Furthermore, a court clerk only enjoys this qualified immunity once he has demonstrated that he acted in good faith, and within his lawful authority. McCray v. Maryland, 456 F.2d 1, 3-5 (4th Cir. 1972). Since the plaintiffs' allegations are taken as true for the purpose of a motion to dismiss, Hill cannot prevail on the issue of qualified immunity at this stage of the litigation.

Arnot, the bankruptcy trustee's court appointed counsel, also states that he enjoys immunity, and seeks dismissal with prejudice pursuant to Rule 12 (b) (6). In order to determine whether Arnot enjoys qualified judicial immunity, one must first determine whether the trustee himself is immune from suit. As previously noted, the Bankruptcy Appellate Panel of the 9th Circuit, in In re Jacksen, 105 Bankr. 542 (Bankr. 9th Cir. 1989), has determined that the trustee enjoys immunity with respect to his administration of the Jacksen estate. As Arnot was acting as the court appointed counsel to an immunized trustee, and all allegations involve his official acts on behalf of the bankrupt estate, he is entitled to derived judicial immunity. Smallwood v. United States, 358 F. Supp. 398, 404 (E.D. Mo. 1973). Accordingly, the instant suit with regard to defendant Arnot is dismissed pursuant to Rule 12 (b) (6).

Defendant Poppin, the court appointed counsel of the debtors in possession, also states that he is entitled to derived judicial immunity. The plaintiffs' allegations cast Poppin's efforts on behalf of the Jacksens as part of a grand conspiracy. While there is little case law concerning the immunity of a court appointed counsel for a debtor in possession, Poppin presents a compelling case.

The defendant correctly notes that the attorney for the trustee has the same rights, duties and powers as the attorney for the debtors in possession. In re Babylon Cove Marine, Inc., 69 Bankr. 23, 25 (E.D.N.Y. 1986) (citing 11 U.S.C. §'s 1106-1107). Considering that a trustee's attorney is entitled to immunity, Smallwood v. United States, 358 F. Supp. at 404, the defendant requests that the court apply this immunity to the attorney for the debtors in possession. A trustee's attorney, however, is only granted immunity after a court has found that the trustee himself was entitled to derived judicial immunity. Id. Therefore, considering that the attorney for the debtor in possession has the same rights as the trustee's attorney, a court would have to find that the debtors in possession enjoyed immunity. This determination cannot be made at this stage of the litigation, and therefore defendant Poppin's motion with respect to Rule 12 (b) (6) is denied.

III.

Conclusion

For the foregoing reasons, the plaintiffs' suit is dismissed with regard to defendants Jaroslovsky, Brown and Arnot pursuant to Rules 12 (b) (2), 12 (b) (3), and 12 (b) (6). The suit is dismissed with regard to defendant Hill pursuant to Rules 12 (b) (2) and 12 (b) (3), and with regard to defendant Poppin pursuant to Rules 12 (b) (2), 12 (b) (3) and 12 (b) (5). The suit is dismissed with regard to Duck pursuant to Rules 4 (j) and 12 (b) (6).

SO ORDERED this 11th day of September, 1990 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS AND SANDRA READ

VS.

CHARLES DUCK, ET AL.

CIVIL H-89-655 AHN

JUDGMENT

This action having come on for consideration of the defendants' motions to dismiss before the Honorable Alan H. Nevas, United States District Judge, and,

The court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Defendants' motions to Dismiss, granting the motions,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut, this 13th day of September 1990.

KEVIN F. ROWE, Clerk

By_____
Dennis P. Iavarone
Deputy in Charge

THOMAS M. READ, 161 Grove Street
Bristol, Connecticut 06010 (203) 582-5361

THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
THOMAS AND SANDRA READ,
Plaintiffs

vs.:

CHARLES DUCK, ET AL
Defendants:

Civil Action No.H-89-655 (AHN)

21 June 1990

PLAINTIFF'S MOTION TO DECLARE AN ORDER OF INJUNCTION VOID

Pursuant to Rule 60 (b) (4) of the Federal Rules of Civil Procedure, the Plaintiffs Thomas M. Read and Sandra A. Read respectfully moves this Court to enter judgment declaring void and without effect upon its creation, an order entered by the U.S. Bankruptcy Court, Northern District of California, on 18 July 1988, a copy of which is Plaintiffs' Exhibit DD, the first document, of their complaint. The Plaintiffs rely upon all that they have asserted to this court in general and that which is contained within their attached memorandum in particular as basis in fact and law for their motion herein.

THE PLAINTIFFS

THOMAS M. READ
161 Grove Street
Bristol, CT 06010
(203) 583-5361

ORDER ON MOTION
8/2/90 - DENIED, /s/Alan H. Nevas USDJ

THOMAS M. READ 161 Grove Street
Bristol, Connecticut 06010 (203) 582-5361

THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS AND SANDRA A. READ,:
Plaintiffs
vs.
CHARLES DUCK, ET AL:
Defendants

Civil Action No.
H-89-655 (AHN)
30 June 1990

PLAINTIFFS' MOTION FOR IMMEDIATE RECUSAL OF JUDGE ALAN H. NEVAS FROM THIS INSTANT LAWSUIT

Pursuant to 28 U.S.C. Sec. 455(a) and (b)(1), Plaintiffs request the Hon. Alan H. Nevas to disqualify himself from further proceedings in or related to this case at bar.

On 23 May 1990, our attorney, Konstantinos Diamantis, Esq, submitted his motion to withdraw his appearance in the above case. Plaintiffs immediately filed their pro-se appearances, and a statement that they did not believe their interests were compromised by the withdrawal of their attorney.

The court failed to enter an order upon Plaintiffs' attorney's motion for over one month. At a hearing on 27 June 1990, the court refused to grant Plaintiffs' attorney's motion, and further implied by its statements, that its reasoning was predicated upon its intent to sanction Plaintiffs' attorney for merely filing the above captioned lawsuit.

ORDER ON MOTION
7/9/90 - DENIED, /s/ Alan H. Nevas, USDJ

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of October, one thousand nine hundred and ninety.

PRESENT: HONORABLE JON O. NEWMAN
HONORABLE GEORGE C. PRATT
Circuit Judges.
HONORABLE THOMAS P. GRIESA,
District Judge.*

90-6218

THOMAS M. READ and SANDRA A. READ,
Plaintiffs-Appellants,

v.

CHARLES DUCK, JOHN POPPIN,
ALAN JAROSLOVSKY, ROBERT HILL,
PHILIP ARNOT and CONNELLY S. BROWN,
Defendants-Appellees.

ORDER

Thomas and Sandra Read appeal pro se from two orders of the District Court for the District of Connecticut (Alan H. Nevas, Judge). The first order, entered July 9, 1990, denied a motion seeking recusal of Judge Nevas. The second order, entered August 3, 1990, denied a motion to declare void an injunction issued by the Bankruptcy Court for the Northern District of California. The orders were entered in a suit by the Reads against the California bankruptcy judge and

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* Of the District Court for the Southern District of New York, sitting by designation.

others. That Court had enjoined the Reads from seeking to enforce a Connecticut state court judgment, which had been entered in 1986 in a suit by the California debtor against the Reads. The bankruptcy trustee prosecuted the Connecticut state court suit, in which the Reads asserted a counterclaim. That suit resulted in judgment for the Reads, both as to the complaint and their counterclaim, on which they were awarded $10,000.

The Reads then sought to enforce the Connecticut judgment against the bankruptcy trustee personally. That effort resulted in an order of the California Bankruptcy Court enjoining the Reads from enforcing the judgment, the bankruptcy proceeding having been closed. The Reads unsuccessfully appealed that ruling to the Bankruptcy Appellate Panel in the Northern District of California, but sought no further direct review.

We face an initial issue as to whether the challenged rulings are appealable. The recusal order appears to be interlocutory, though the injunction order is arguable appealable under 28 U.S.C. § 1292(a)(1) (1988). Whether or not these two orders would be appealable in the absence of a final judgment, a final judgment was entered in this case on September 13, 1990, dismissing the action. Though the finality of that judgment was destroyed when the Reads filed a motion for reconsideration on September 24, see Rule 4(a)(4), Federal Rules of Appellate Procedure, that motion has not been denied. The final judgment is now eligible for appeal, and in these circumstances, the pending appeal from the two orders now challenged is at worst premature, a defect we have deemed cured in some circumstances by entry of a final judgment. See Pireno v. New York State Chiropractic Ass'n, 650 F.2d 387, 389 n.1 (2d Cir. 1981). We will therefore consider the merits of the pending appeal.

The two motions filed by the Reads, denial of which is challenged on this appeal, are utterly frivolous. There is no basis whatever for recusal of the District Judge. Indeed, Judge Nevas has acted with forbearance in not imposing sanctions for the Reads' pursuit of frivolous litigation. Nor is

there any basis for pursuing in the District of Connecticut a suit against the California Bankruptcy Judge and the other defendants. Jurisdiction and venue are lacking. The suit is a misguided attempt to bring a collateral attack on a judgment of the California court. If the Reads had any valid ground for challenging the California injunction, they were obliged to pursue their appellate remedies in the Ninth Circuit.

The orders of the District Court are affirmed. The Reads are cautioned that any further attempts to bring any aspect of this litigation back to this Court will expose them to the distinct risk of sanctions in the form of assessments of money damages against them personally. See Rule 38 of the Federal Rules of Appellant Procedure.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

/s/_____

/s/_____
Circuit Judges

/s/_____
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE WILLIAM H. TIMBERS,
HONORABLE JON O. NEWMAN
HONORABLE FRANK X. ALTIMARI,
Circuit Judges.

THOMAS READ, ET AL.,
Appellants

v.

CHARLES DUCK, ET AL.
Appellees.

90-6332

ORDER

By Order entered October 30, 1990, this Court affirmed two rulings of the District Court, in this litigation, Read v. Duck, No. 90-6218 (2d Cir. Oct. 30, 1990), and stated:

The Reads are cautioned that any further attempts to bring any aspect of this litigation back to this Court will expose them to the district risk of sanctions in the form of assessments of money damages against them personally. See Rule 38 of the Federal Rules of Appellate Procedure.

In utter disregard of this caution, the Reads have filed the instant appeal. Accordingly, it is hereby ORDERED that the appellees' motions to dismiss are granted and the appeal is dismissed as frivolous; it is further ORDERED that the Reads, jointly and severally, shall be assessed $1,000 in damages for a frivolous appeal and shall pay the $1,000 in damages to Joseph T. Sweeney, Esq., counsel for appellee John Poppin.

The damages shall be paid within ten (10) days, failing which the Reads will be liable to further sanctions for contempt of Court. The Clerk of this Court is instructed not to file any further papers from the Reads until such time as they provide the Clerk with satisfactory evidence of payment of the sanctions imposed by this Order.

_____

_____

_____

Circuit Judges.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 15, 1991

Mr. H. Gordon Hall
U.S. Attorney's Office
141 Church Street, PO Box 1824
New Haven, CT 06508

Re: Thomas Read, et ux.
v. Charles Duck, et al.
No. 90-7107

Dear Mr. Hall:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied

Very truly yours,

/s/William K. Suter, Clerk

UNITED STATES TRUSTEE PROGRAM IN BANKRUPTCY

[TITLE PAGE OF ORIGINAL]

HEARING
BEFORE THE
SUBCOMMITTEE ON
ECONOMIC AND COMMERCIAL LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SECOND CONGRESS
FIRST SESSION

NOVEMBER 6, 1991

SERIAL NO. 61

[PAGE 1 OF ORIGINAL]

UNITED STATES TRUSTEE PROGRAM IN BANKRUPTCY

WEDNESDAY, NOVEMBER 6, 1991

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW, COMMITTEE ON THE JUDICIARY
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:40 a.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Don Edwards, Romano L. Mazzoli, Hamilton Fish, Jr., Lamar S. Smith, Craig T. James, and Carlos J. Moorhead.

Subcommittee staff present: Cynthia W. Meadow, counsel; George P. Slover, assistant counsel: Perry Apelbaum, assistant counsel; Mary V. Heuer, research assistant; and Linda Jo Shelton, office manager; full committee staff present: Peter J. Levinson, minority counsel, Committee on the Judiciary.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. Brooks, The Subcommittee on Economic and Commercial Law meets today to conduct an oversight hearing on the U.S. Trustee Program. This program, housed within the Department of Justice, is responsible for handling the administration of bankruptcy cases.

To the outside observer, one might begin the process with the presumption that of all the units of the Justice Department that have stirred up controversy in recent years, the U.S. Trustee Program would surely be at the bottom of the list. Yet, that is not the case if one monitors the increasing number and intensity of complaints received by the subcommittee in recent months.

A hint of potential scandal and abuse was intimated at earlier hearings of this subcommittee in 1987 and 1989 when we received testimony about the program becoming politicized. Apparently, that is still a valid concern, among others.

We have now received troubling reports that U.S. trustees are not doing enough to combat fraud, including private trustee fraud, and that conflicts of interest have arisen for U.S. trustee in cases in which the Department of Justice or another Federal agency has an interest.

With regard to private trustee fraud, reports indicate that since 1987, 17 former private trustees and 5 of their employees have been convicted of embezzling funds in excess of $6.1 million from bankruptcy estates. Today, we expect to hear testimony from a U.S..

[PAGE 2 OF ORIGINAL]

trustee who has uncovered millions of dollars of trustee fraud in his region. Unfortunately, I fear that these instances, like most investigations, may only be the tip of the iceberg. Given the increasing numbers of bankruptcy filings at a time of deep and lingering recessing, we cannot afford to take chances with the trustee system.

Conflict of interest accusations have also been leveled by bankruptcy judges against U.S. trustees. We will hear from former Bankruptcy Judge George Bason concerning such conflicts in the notorious Inslaw case, which this committee is investigating on another tract.

Recently, Judge R.F. Wheless in Houston wrote in the case In Re: Tomlinson Interests Inc., that "the U.S. trustee and his assistants have openly acted in concert with the Department of Energy in an apparent effort to maneuver the case to best assist the DOE to sustain its disputed $130 million claim in the case." These assertions of conflicts of interest by these two bankruptcy judges are very strong indictments against the Department of Justice's supervision of the U.S. Trustee Program.

Today's hearing will provide the subcommittee an opportunity to examine these concerns as well as to monitor

BEST AVAILA

generally the overall effectiveness of the U.S. Trustee Program. We are going to hear from representatives of the U.S. Trustee Program as well as from different groups of individuals who deal with the program on a regular basis. Their testimony should prove useful to the subcommittee in its efforts to assure that the bankruptcy system is run with integrity, fairness, and effectiveness.

I am not going to stand by while those caught up in the unfortunate economic crisis facing this country are subjected to further abuse by those entrusted with the fair administration of the bankruptcy system.

I would tell the subcommittee members--I read all the testimony last night--and I tell you, the rule is this. If you are dead broke, go ahead and file for bankruptcy. However, if you have any property left, you had better deal with the creditors yourself, because if there is much left somebody is going to steal it, throw it away, or let it rot. The bankruptcy system will do you in like you have never been done. But if you are absolutely broke, file for bankruptcy.

But if you've got any property at all, you had better fight it out yourself because the system will get you if you don't. Trustees can hire lawyers and accountants that bleed the estate. It is a wonderful deal. I don't see how they do it in good conscience. And the judges are too busy to go and watch them.

If you have any money, Craig, don't file bankruptcy because they will get it all.

MR. JAMES: Thank you, Mr. Chairman; I will follow your advice.

[PAGE 3 OF ORIGINAL]

STATEMENT OF JOHN E. LOGAN, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

MR. LOGAN. Thank you, Mr. Chairman. It is a privilege to appear before the committee today. As you note, our statements are rather lengthy, and I will simply seek to summarize it.

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The U.S. Trustee Program oversees the administration of bankruptcy cases. In that regard we appoint trustees, supervise their conduct. We oversee the conduct of debtors.

At the same time we seek to create an incentive for creditor participation in the process, mainly through ensuring that the financial status of the debtor is fully disclosed.

As Mr. Edwards noted, the 1978 reform act set up the program. In 1986 the Congress enacted the program nationwide. From 1986 to 1990 there was a transition period in which we took over the supervision of the cases from the judiciary.

I think it is important to note the system we inherited. Candidly, it was a system that had no standard of accountability, and therefore no assurance of fiduciary standards. I think as you journey through the chapters of the Bankruptcy Code and see what we have encountered, you will get a sense of the challenges we face.

In chapter 7, which is the overall caseload of the system, about 700,000 this year, what we encountered was a system in which trustees who are obligated to liquidate estates and make distributions to creditors had not only a wide-ranging series of variances across the country, but more important, there were basic controls lacking.

We found districts in which trustees did not know how many cases they had. More important, we found cases that simply sat on the dockets for years. Overall, we became, and are very concerned, that the law's demand for fiduciary standards be met. In that sense, we have devoted several efforts to try to bring an accountability structure to the process.

Two of those major efforts are reporting requirements to obligate the trustees to report on their cases twice annually, and also a program which ensures that the trustees are audited. Both the auditing and reporting requirements are meant to bring out the basic obligations of what a trustee is doing. Is the trustee adhering to fiduciary standards? Is the fiduciary moving the cases forward? Is the trustee distributing the assets to creditors properly?

[PAGE 5 OF ORIGINAL]

I think over the last couple of years particularly, we have found those trustees who are very serious about their obligations and embrace this accountability structure. And in fact we have made some effort to work with them to refine the accountability process to make it more efficient.

At the same time we have also found those who have strayed far from fiduciary duties. In fact, as the chairman noted, we found a significant number of trustees and employees who have embezzled moneys from estates. We have that in the world of chapter 7 administration.

When you move to chapter 11, you find a different circumstance. You find a circumstance with two phenomenons, one in which the large number of cases have minimal or little creditor involvement. In that case the debtor simply comes into the system and obtains the protections, but doesn't meet the obligations to disclose their financial conditions and move the case forward, one way or the other.

In this effort we have tried to encourage and create a system in which those cases simply don't stay on the docket. Again, we encountered, when we took over and to some degree continue to deal with, the problem of cases stagnating, some dating as far as back as 1979, when the code became effective.

The other major issue in chapter 11, of course, is the high-profile cases, the cases that are hitting the courts these days, which represent large corporate entitles attempting to restructure, to a large degree, from the leveraged buyouts of the late 1980's. In that sense our obligation is not so much to create creditor participation, because not only are there a great deal of creditors, they are well represented, but more so to take on those areas the parties in interest simply don't confront, like attorney's fees, like professional fees. Just as important are those issues in the Bankruptcy Code which make very clear what conflicts of interest there are in the system and what Congress has enacted as to what is precluded. It is rare for the parties to raise those issues.

We have viewed it as part of our obligation to ensure not only the efficiency and effectiveness of the system, but also its integrity. I think when you look at our conduct, our actions in chapter 7 and, of course, chapters 12 and 13, where trustees are also appointed, as well as chapter 11, we have been able to develop an ability to examine the debtors, examine their assets, see what truly has happened in their predicament.

And you will find on occasion, particularly with a caseload which I think will be 1 million cases this year, those who come in for more than protections of the Bankruptcy Code. They come in basically to commit a fraudulent criminal scheme or continue one.

I think we have been successful, not only in bringing the resources together--resources which previously were not confronted or focused, with the Federal Bureau of Investigation and U.S. attorneys. But most important I think the cases we have referred to the U.S. attorneys are beginning to be a deterrent to the system.

I think, in summary, Mr. Chairman, without a doubt, the program has encountered both tension and resistance. I think the resistance can be focused on those who embraced the status quo, as

[PAGE 6 OF ORIGINAL]

well as those who really are confronting us with their own private economic interest in mind.

In terms of the tension, I think that focused tension, coherent tension is actually a benefit to the system. We clearly understand that the major reforms that Congress enacted, to separate the adjudicative functions from the administrative functions, and more important, to create one accountable agency for the administrative functions, is a fact that Congress gets credit for the reforms. It is up to us to carry out our duties and responsibilities with competence, and be judged by how well we do that. In that sense we continue to look forward to these responsibilities and opportunities.

At this point, why don't I yield to Mr. Sousa, who is the U.S. trustee in San Francisco.

[PAGE 32 OF ORIGINAL]

MR. BROOKS.. Mr. Sousa, the gentleman from California.

STATEMENT OF ANTHONY G. SOUSA, U.S. TRUSTEE' REGION 17

MR. SOUSA. Thank you, Mr. Chairman and members of the subcommittee.

Thank you, Congressman Edwards, for the kind introduction. I would like to thank the whole subcommittee for allowing me to appear before them as it conducts this oversight hearing of the U.S. Trustee Program.

I joined the program in 1988. The region I serve is denominated as region 17. Region 17 has seven offices which serve the Northern and Eastern Districts of California and the District of Nevada. The region began operating on November 19, 1988. Since my appointment, I have encountered firsthand the problems and attitudes which confronted this organization when it first went nationwide.

Change brings out a natural animosity or resentment in those who feel threatened by what they perceive as an attack on the existing order. It takes time to build credibility and to demonstrate that the change is in fact necessary.

My first experience in region 17 brought home to me, and I think to many others, the need for a program such as ours. When we first opened our doors in November 1988, all the existing panel trustees were invited to apply for reappointment on the U.S. trustee panel of chapter 7 trustees.

Charles Duck, who was one of the most prominent trustees under the old system, had served on the panel as a bankruptcy trustee in Santa Rosa, CA, since 1975. He was widely regarded as a good trustee. Accordingly, he had a large volume of cases assigned to him. Although Mr. Duck submitted an application to qualify as a trustee under the U.S. Trustee Program, he later withdrew in January 1989, but continued to administer his old cases.

We had concerns about Charles Duck almost at the outset because we had received so many complaints about

him. A February 1988 examiner's report in one of his cases was particularly critical of his performance and practices.

We met with him to try to resolve these problems and received conflicting explanations, which did little to alleviate our concern. We continued to be troubled by the discrepancies and particularly Duck's practice of loaning money to the estates to keep them going.

I recall one instance in which our office joined a creditors committee in objecting to an action which Duck had proposed. The judge, apparently aware of the problems we were having with Duck, railed against our program for what he considered to be an attack on Duck. In a meeting requested by the judge, he told me that Charles Duck was not only the best trustee in all of northern California, he was possibly the best trustee in the entire country.

I conducted a preliminary review of Charles Duck's operations, which indicated a cause for concern. After sharing my growing concern with the Executive Office, the Chief of the Audit Review Section in Washington was assigned to conduct an indepth review of Charles Duck's cases. Since the region had just started operating, it only had jurisdiction on cases filed on or after November 26, 1986. Consequently we had no authority in many of Duck's cases which were filed long before that.

[PAGE 33 OF ORIGINAL]

The audit commenced during the first week of March 1989. Duck initially cooperated in allowing the auditor access to portions of his estate files and financial records, but when the auditor found a number of transactions emanating from one particular bank account, Duck refused access to the account, claiming it was his personal fund.

Following the auditor's initial visit, Duck and his attorney reaffirmed his position that the "exchange bank" account, as it became to be known, would not be made available for inspection because they claimed it only contained Duck's personal moneys.

As the auditor continued his review of Duck's files, bits and pieces of information were gathered, all of which

showed Duck used the exchange bank account as a slush fund of bankruptcy estate moneys. For example, we were able to show that while Duck was purporting to loan to and repay himself from several estates, he could not recount exact figures. In fact, from report to report, amounts varied.

We demonstrated not only the volume of so-called loan transactions, but the amounts which approached or exceeded six figures in several cases were highly unusual and unorthodox under any circumstances. We obtained copies of canceled checks which were paid to Duck in his official capacity as trustee in bankruptcy cases. These checks were deposited to the exchange bank account which he insisted was a personal account.

Our office filed an emergency motion to gain access to the exchange bank account, citing as grounds the auditor's findings. The court, obviously alarmed by what had been presented, ordered Duck to turn the records over. In the process the court rejected Duck's fifth amendment claim to protection of the bank records at issue.

Duck then filed a notice of appeal. He also sought to obtain a stay pending appeal. When his stay request was denied, first by the bankruptcy court and then by the district court, Duck finally capitulated.

On May 17, 1989, he resigned from all of his cases. On September 25, 1989, a two-count criminal information was filed in the U.S. district court in San Francisco, charging Duck with embezzling almost $1.9 million in bankruptcy estate funds. He pleaded guilty to both counts and was sentenced on January 19, 1990, to 27 months in Federal prison, fined $5,000 and ordered to pay restitution of $1.9 million.

Since that time more losses have been uncovered, bringing the total to over $2.6 million, and, as successor trustees attempt to complete Duck's old cases, even more discrepancies are coming to light. The magnitude of Duck's scheme sent shock waves throughout the community. Though many cases were hit by Duck's defalcation, the aftermath of the incident will serve to prevent future lapses.

More than previously, trustees seem to have a better understanding and appreciation of what the program's role is and what their fiduciary responsibilities are.

As I alluded to earlier, it takes time for a young program to gain credibility. That is particularly true, I think, in the bankruptcy system, because for years it operated without an outside monitor. No one ever played the role we now have.

[PAGE 35 OF ORIGINAL]

MR. BROOKS. The gentleman from Florida, Mr. James.

MR. JAMES. Thank you. You say there are only 1,500 trustees in the entire United States for bankruptcy.

MR. LOGAN. I should correct. Those are chapter 7 trustees.

MR. JAMES. Chapter 7.

MR. LOGAN. Individuals obligated to liquidate and distribute to creditors. Chapters 12 and 13, there are probably another 200.

MR. JAMES. What about chapter 11?

MR. LOGAN. Chapter 11, it's a handful. I am not sure we have across the country several hundred.

MR. JAMES. Aren't most of them lawyers?

MR. LOGAN. Yes.

[PAGE 36 OF ORIGINAL]

MR. JAMES. If there is negligence or incompetency, don't most of them have insurance to cover it?

MR. LOGAN. We have pursued that. What we have run into the dilemma that the State agency holding the fund, the attorneys' fund usually resists that.

MR. JAMES. I am talking about the fact that a lot of them are insured by private companies, if they also practice law; and most of them do, do they not?

MR. LOGAN. That's right.

MR. JAMES. So then it is malpractice.

What about intentional acts of fraud their companies will not cover?

MR. LOGAN. That is right.

MR. JAMES. Why don't we make a requirement, in order to be a trustee, a bond be required for those fraudulent acts?

MR. LOGAN. In fact, there is. You focused on one of the demands of the system. It is not simply to ensure the bond is in place, but to ensure the bond is high enough.

MR. JAMES. Indeed, so we will just make the bond higher--that's up to the court. That is because the court hasn't made it high enough. So it really is the problem of the court, the Federal judge handling it, if he has not investigated enough to make a proper bond determination.

Would we not look at the procedures for determining what the size of the bond should be, and that could be one of the solutions?

MR. LOGAN. Sure. Along those lines, what we have tried to do is get an overall blanket bond for particular districts.

MR. JAMES. I don't see that as a recommendation, or did I miss it?

MR. LOGAN. That is one area I think we are trying to pursue administratively to get what they call blanket bonds to cover all trustees in the district. As you can imagine that has a much higher threshold.

MR. JAMES. It seems to me it is more a problem with the competency of trustees, the way the Federal judge handles it, and that those factors, if properly resolved, would solve most of them.

MR. LOGAN. Sure. I would only add, I suspect the court would look to us, as in charge of the supervision of the trustees, to bring forth that issue to the court. So I don't want to seem like it is a court-related problem. It is perhaps more our problem.

MR. JAMES. OK. Do you find a higher percentage of fraud among trustees, as opposed to bank officers or corporate officers, or others? Have you made a comparison to see if you were attracting a particularly high percentage of trustees that commit fraud?

MR. LOGAN. No. In fact, I suspect it is a low percentage. Of course, that is what the system has to focus on.

MR. JAMES. I don't see the problem if you set the bond high enough and have malpractice insurance. Those lawyers are subject to being disbarred. How many of those 26 were prosecuted criminally?

MR. LOGAN. Were prosecuted successfully.

MR. JAMES. How many out there do you suspect are just not caught yet? Do you have any statistics on that?

[PAGE 37 OF ORIGINAL]

MR. LOGAN. No. One of the difficulties is that what we find often is that the accounts, their financial records are in chaos. It does not mean they are necessarily stealing. The length of time it takes to simply resolve the chaos, as Mr. Sousa related in the Duck case, is tremendous. I think--preparing the program's budget, I think we had 2 workyears on the Duck case.

MR. JAMES. Excuse me, then, but does not that relate to the competency of the trustees that the Federal judge selects in the first instance?

MR. LOGAN. Well, again --

MR. JAMES. "Chaos" meaning they don't know what they are doing or they are not keeping proper records in some cases.

MR. LOGAN. I think that is what we are confront now. As the system has changed, the court is looking to us to both appoint and monitor these trustees.

MR. JAMES. It does occur to me it is a major problem, because the trustee who may be more than adequate in one type of business is something less than adequate in another type. You can't expect a trustee to be an expert in absolutely every area.

It seems to me the problem occurs when the judge appoints a trustee that is less than competent in a particular type of business. It seems to me the root of the problem is in the selection of the trustee and the size of the bond.